No. 20241

In the

United States Court of Appeals

FOR THE NINTH CIRCUIT

ELRANCO, INC., a Nevada corporation, EL RANCO HOTEL OPERATING CO., a Nevada corporation, BELDON R. KATLEMAN, MCA ARTISTS, LTD., a Delaware corporation, ROY GERBER and MATT GREGORY,

Appellants,

vs.

RENE BARDY,

Appellee.

Appeal From the United States District for the District of Nevada.

Brief of Appellants El Ranco, Inc., El Ranco Hotel Operating Co. and Beldon R. Katleman.

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Preliminary Statement.

Co-appellants MCA Artists Ltd. and Roy Gerber are filing a separate brief herein. Except for certain necessary overlapping, counsel for all appellants have attempted to avoid duplication of argument wherever they have deemed it feasible. However, appellants El Ranco, Inc., El Ranco Hotel Operating Co. and Beldon R. Katleman do adopt all matters contained in the brief of their co-appellants and do rely thereon on this appeal.

Jurisdiction.

Jurisdiction of the District Court in this case is based on diversity of citizenship (28 U.S.C.A. 1332). It was alleged in the amended complaint that the appellee was a citizen of the French Republic, appellants Beldon R. Katleman, Roy Gerber and Matt Gregory were citizens of Nevada, appellants Elranco, Inc. and El Ranco Hotel Operating Co. were Nevada corporations and appellant MCA Artists, Ltd. was a Delaware corporation [R. 141, lines 8-9; R. 142, lines 4-7]. It was also alleged under 15 U.S.C.A. 1121 and 28 U.S.C.A 1138(a) by virtue of the fact that the cause of action arose under 15 U.S.C.A. 1126(b), (g) and (h) [R. 141, lines 1-4].

Jurisdiction of this Court on appeal is based upon its statutory appellate jurisdiction (28 U.S.C.A. 1291) and the timely invocation, by appellants, of the prescribed procedure [Rule 73, F.R.C.P.; R. 2307].

Statement of the Case.

Appellee has been in show business since he was ten years of age [T. 1391, lines 9-11]. In 1934 he opened a cabaret called Cabaret Eve in Place Pigalle [T. 1391, lines 15-22]. It was operated by a corporation he formed called La Fountaine Eve. Most of the stock was in his name. The balance was in the names of people who granted him the use of their names for such purpose [T. 1392, lines 2-25].

In France there are two types of societies which are closely akin to corporations.[1] A society anonym, whose shares are publicly held and managed by a board of directors and a society S.A.R.L., which is managed by one or more managers [T. 2023, lines 3-24]. They are

[1]During appellee's testimony both corporation and society were used.

both artificial separate legal entities. They are juridical entities [T. 2017, lines 1-26].

There were several other corporations that ran Cabaret Eve, including Sedrac and Secmat [T. 1393, line 8, to T. 1395, line 6]. Appellee was a stockholder "more or less" in each of these corporations. In the societies which required capital from others he used friends' names, but it was his money [T. 1395, line 7, to T. 1397, line 12]. There were sales of shares in Secmat, but it was done from one friend to another with no money changing hands. He sold his shares in Sedrac in 1954 or 1955 and retained no interest in Cabaret Eve [T. 1395, line 8, to T. 1399, line 1].

In 1950 a club called La Nouvelle Eve was opened. It and Cabaret Eve are both in the Montmarte region of Paris. Cabaret Eve has continued to operate, but it is called Nue Eve de Paris [T. 1399, line 25, to T. 1402, line 4].

Since 1950 the land and building at 25 Rue Fontaine, where La Nouvelle Eve is located, have been owned by Mansart, which is a real estate corporation. Appellee's relatives and friends own the shares, but they purchased them with his money [T. 1403, line 1, to T. 1404, line 11]. In 1950 the club was operated by a corporation called La Nartella for two or three years. The shares of stock were held in other people's names [T. 1404, lines 16-22]. Appellee then formed Societe de Gerance de La Nouvelle Eve, which became a subtenant of Nartella, which was a tenant of Mansart [T. 1425, lines 5-22].

Both Nartella and Societe de Gerance de La Nouvelle Eve exploited the business including putting on shows during the years each of them operated the club [T. 1422, lines 19-22; T. 1424, lines 15-24; T. 1426, lines 12-23].

Appellee evicted both Nartella and Societe de Gerance de La Nouvelle Eve because of nonpayment of rent and the club was closed during 1955 [T. 1427, line 10, to T. 1428, line 3].

The club was reopened in 1956 by Societe Escarpolette, which appellee formed that year. All the stock was in the name of Mr. Francois and George Guiol. Appellee was the manager under the name Doornick [Ex. LC]. Francois and Guiol gave appellee assignments in blank of their shares of stock [T. 1428, line 12, to T. 1429, line 8]. No name was inserted in the blanks [T. 1467, lines 6-22].

Escarpolette owned the business during 1956, 1957 and 1958, and received all the money taken in from people who saw the show at the club. Appellee had an arrangement with Escarpolette whereby he received author's royalties and he had the privilege of dining at the club whenever he wanted to [T. 1434, lines 4-15; T. 1439, line 24, to T. 1440, line 13].

Author's royalties were paid by Escarpolette to the Author's Society. Appellee was not a member of the society, but he used assumed names, at first that of Madame Deryckere and later Tanya Floria, a dancer at the club. Deryckere, his ex-wife, was a member under the assumed name of de Ricaire. They gave the royalties back to appellee. This device helped him to save on his income taxes [T. 1435, line 15, to T. 1437, line 20; T. 1439, lines 2-5]. Deryckere testified that she was in fact the author, but appellee forced her to return the royalties and she received a salary only [T. 1782, line 25, to T. 1786, line 25]. There is no evidence with respect to the amounts of any royalties.

In 1956, Escarpolette produced a show called Extravaganzas; in 1957, Seduce Me, and in 1958, Shocking [T. 1433, lines 9-19].

On August 1, 1958, appellant MCA Artists, Ltd. (hereinafter referred to as "MCA") entered into an agreement whereby it became exclusive representative for appellee for North and Central America to secure engagements for the show [Ex. 73]. MCA's agent in Las Vegas was appellant Roy Gerber, who interested appellant Beldon Katleman in the show [Ex. 449].[2] Katleman went to Paris about the middle of October to see the show and entered into initial negotiations with David Stein of MCA's Paris office [Ex. 452]. On October 16, 1958, Stein sent a memo to Larry Barnett of MCA with a copy to Gerber, reciting that Katleman had met with appellee, the manager of Nouvelle Eve Corporation and Madame Deryckere, his artistic director, and Stein [Ex. 452]. Appellee came to Las Vegas about October 24, 1958, and he and Gerber negotiated with Katleman. Katleman did not like the production singer and several of the manikins and appellee agreed to replace them. The price was to be $15,000 per week, including transportation. The specialty acts were to be provided by the Hotel [T. 2417, line 6, to T. 2421, line 17].

Gerber prepared a contract dated November 25, 1958 [Ex. 90], but it was not executed [T. 2426, line 25, to T. 2427, line 14].

A new contract was drawn up by Gerber about December 1, 1958 and sent to Paris [Ex. D]. It was returned to Las Vegas on December 26, signed by appellee but there were some changes written in, which changes attempted to insert something with respect to dresses, which was other than had previously been agreed upon [T. 2428, lines 7-23].

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[2]Katleman was at all times owner of all the stock in appellant corporations Elranco, Inc. and El Ranco Hotel Operating Co. and those corporations are hereinafter referred to collectively as the "Hotel".

Appellee again came to Las Vegas on January 2nd or 3rd, 1959, where discussions were carried on with Katleman and Gerber. The matter of the production singer and manikins was again discussed and there was a reconfirmation of the previous understanding with respect thereto [T. 2429, line 7, to T. 2433, line 7].

On January 5, 1959, Paul Sherman of American Guild of Variety Artists (hereinafter referred to as "AGVA") wrote Gerber advising that AGVA wanted a letter by the parties to the December 1, 1958 contract stating that whenever artist was used therein it meant the producer La Nouvelle Eve Corporation, and the Hotel's bond with AGVA could be applied to La Nouvelle Eve Corporation so that no separate bond would be required [Ex. 98].

The troupe arrived in Las Vegas January 19th or 20, 1959 [T. 2456, line 25, to T. 2457, line 3]. About a week before Katleman received a phone call from Gerber that there was no money to pay the transportation for the troupe to come to Las Vegas and $12,000.00 was advanced by the Hotel for that purpose. Another $15,000.00 was advanced before Katleman even saw one rehearsal [T. 2654, lines 4-22]. The round trip transportation cost was $21,442.32, leaving a balance owing of $9,442.32 [Ex. MS]. These sums advanced were amortized during the run of the show and deducted from checks paid by the Hotel [T. 2655, lines 1-4].

Although appellee had agreed to include a number which Katleman had requested, it did not exist and Tom Douglas, who worked for the Hotel, had to design a stage setting and costumes had to be purchased by the Hotel for the girls in the number. Costumes also had to be purchased for Miss Caire, the new production singer, and changes in musical arrangements had to be made which were also paid for by the Hotel and billed to the show [T. 2469, line 5, to T. 2471, line 25].

In December 1958, Escarpolette went out of business because it was convenient to appellee [T. 1456, line 20, to T. 1457, line 2]. On December 1, 1958, Escarpolette adopted a resolution which provided that as Escarpolette did not have the back rent it owed Mansart and was threatened with eviction and had definitely intended to go out of business on December 31, 1958, it was dissolving as of December 1, 1958 and Mr. Miel, its legal counsel, would be the liquidator [Ex. B; T. 1461, line 23, to T. 1465, line 2]. The resolution was signed by appellee as Rene Doornick and published in the newspaper on January 3, 1959 [T. 1459, line 20, to T. 1460, line 5].

Miel assigned to appellee, on March 9, 1960, all his rights in Nouvelle Eve Corporation, La Nouvelle Eve, Paris, La Nouvelle Eve Revue, La Nouvelle Eve Show, the company, L'Escarpolette and the name La Nouvelle Eve and his rights to all claims against the appellants [Ex. 426]. Similar assignments were obtained from Roger Francois and George Guiol [Ex. 415], Madame Deryckere [Ex. 419] and Societe Cythere [Exs. 438, 439]. (Cythere was the corporation which operated the club after it was reopened in September, 1959; the stockholders were Agedas and Hoffman, who bought their stock with appellee's money and then assigned it in blank [T. 1523, line 18, to T. 1526, line 1]). All of the assignments were made while this action was pending [Exs. 415, 419, 438, 439].

Murray Richards, the attorney for the French Consul General in San Francisco, and an expert on French law, testified that P.P. is an abbreviation for par procuration. A literal translation is by procuration or by power of attorney. Under French law, P.P. indicates the person affixing the letters to his name is acting under a general power of attorney to act on behalf of someone else. A person would not properly sign on his

own behalf a signature coupled with the letters P.P. The letters P.P. would be a way of indicating the signer is signing on behalf of someone else [T. 2011, line 19, to T. 2014, line 6]. Richards testified that the signature P.P. R.Bardy meant that Bardy was acting as an agent for someone else [T. 2028, lines 18-24]. Appellee testified he used P.P. in front of his signature when he signed for Escarpolette [T. 1480, lines 1-2].

The letters P. O. are an abbreviation for the French words par ordre, which translated means by order [T. 1478, lines 4-24]. Appellee testified that he used P. O. in front of his signature when it was not for himself personally and when he signed for a society and the letters meant that he was signing for the management of the society [T. 1472, line 25, to T. 1473, line 3; T. 1477, line 18, to T. 1488, line 3].

Appellee received a draft of the contract from Stein in Paris around November 25, 1958, the date on the draft [T. 1132, line 7, to T. 1133, line 5]. Appellee testified that at first the contract was done in the name of Bardy "and after that we add 'corporation'", which word he saw on the contract on November 25, 1958 [T. 1135, lines 10-25]. He took it to a translator, Madame Fagon, who gave him a written translation [T. 1134, lines 4-17]. Appellee testified that Mrs. Fagon had told him that if he had a Monte Carlo corporation it would not have to pay French taxes. Appellee needed a Monasque for incorporation purposes and he wrote a friend in Cannes to get him such a person. He used on stationery the address of that person as the address of the main office of La Nouvelle Eve Corporation in Monte Carlo [T. 1140, line 20, to T. 1145, line 25; T. 1157, lines 3-10].

About a month after the contract with the Hotel was signed [T. 1156, line 4, to T. 1157, line 2], appellee and his secretary prepared an agreement between

La Nouvelle Eve Corporation and Madame Deryckere, his ex-wife, in which she was to receive 25,000 francs per day as author for each day that the show appeared in Las Vegas. That agreement was on La Nouvelle Eve Corporation stationery, which stationery had a government stamp thereon so as to give it "legal validity." The agreement was signed "Pour la Nouvelle Eve Corporation P.O. R.Bardy" [T. 1484, line 11, to T. 1487, line 4]. In the agreement with Deryckere, which appellee testified he and his secretary prepared [T. 1487, lines 2-4], the words "Nouvelle Eve Corporation" appear six times in the one page agreement. It states that appellee represents the corporation. It refers to the corporation as an enterprise which is the license holder of the Revue Shocking being presented in Las Vegas from January 28, 1959 to April 7, 1959 and that the corporation will present the show according to Deryckere's instructions. It provides the agreement is valid only for the corporation's revue in Las Vegas and if it will appear at another place the corporation will inform Deryckere by registered mail.

A contract between La Nouvelle Eve Corporation and American Guild of Variety Artists (AGVA), dated January 15, 1959, was signed "Pour la Nouvelle eve corporation P.O. R.Bardy" [Ex. 105].

Harold Conner is a Las Vegas accountant, who was retained by appellee at the end of January, 1959 as the accountant for La Nouvelle Eve Corporation of Monte Carlo [T. 1819, line 18, to T. 1821, line 3]. He had almost daily dealings with Peter Holmes, appellee's interpreter, in conjunction with the show [T. 1821, lines 4-25]. According to appellee he was in charge of the money received for the show, receiving all checks therefor [T. 1552, lines 12-20].

At Conner's first meeting with appellee, the corporate structure was discussed [T. 1849, lines 8-14]

and he was instructed to open a bank account in the name of La Nouvelle Eve Corporation of Monte Carlo and appellee told Conner that he had a rubber stamp which he had made in Paris [T. 1563, line 20, to T. 1564, line 7] that could be used on the checks until checks could be printed. He gave Conner the rubber stamp [T. 1849, lines 8-14]. The account was opened at a Las Vegas bank in the name of Harold P. Conner and Rene Bardy as trustees for La Nouvelle Eve Corporation and Conner and appellee were signatories until appellee left for France in March, 1959 when, pursuant to his instructions, Peter Holmes' name was substituted for that of the appellee. Appellee signed the bank signature card while Holmes was present and appellee knew its purpose. That bank account was maintained through June 2, 1959, the entire run of the show [T. 1837, line 4, to T. 1838, line 6; T. 1547, line 13, to T. 1548, line 18]. The stamp was used on hundreds of checks signed by appellee, and appellee and Holmes signed hundreds of checks after they were printed with the name La Nouvelle Eve Corporation of Monte Carlo [Exs. 529, 530]. The stamp was also used on other items such as withholding statements [Ex. 515].

Conner took care of all records for the show and made all necessary reports to the appropriate governmental agencies. Social Security and Income Tax withheld was reported on a quarterly tax report and unemployment insurance and Nevada Industrial insurance were reported and paid to the State of Nevada. All reports and payments ware in the name of La Nouvelle Eve Corporation [T. 1838, lines 7-24; Exs. 513, 515, 516].

At Conner's first meeting with appellee, the latter raised the question of the nontaxability of French residents employed in the United States and requested tax advice, and Conner said he would research it [T. 1835,

line 18, to T. 1836, line 14]. On March 2, 1959, Conner wrote to appellee, as president of La Nouvelle Eve Corporation, advising that the Internal Revenue Service concurred with his findings that appellee and members of the shows were not subject to income tax so long as they stayed less than 183 days in the United States, but there was still a question with respect to the taxability of the corporation and a ruling had been requested from Washington, and that the employees and the corporation were subject to FICA (social security taxes). Conner enclosed a copy of the letter from the Internal Revenue Service [T. 1876, line 1, to T. 1880, line 1; Exs. M, M-1].

Appellee thereafter wrote Conner (undated), acknowledging Conner's letter and advising that he was aware of the treaty and its effect and . . .

> "Concerning Eve Corporation, let us say that there is not really such, since it was AGVA which did not wish to mark 'Artist' in their contracts, but 'Nouvelle Eve Corporation'. N.E. Corp., is not therefore, a society or a company, but an individual of French nationality.
>
> "Therefore the accounts may be done in the name of Bardy under the N.E. Corp, and this will avoid any tax problem.
>
> "On the other hand if we do our accounts in the name of N.E. Corp, we must mark into the accounts all of the expenses occurred in France. That is to say, Author's rights, copyrights, costume costs, shoes, wigs, hats, rehearsals, music, etc., and you will find with this a list of these expenses.
>
> "If you establish the accounts in the name of Eve Corp., instead of copying all these expenses, you can simply mark in the accounts.
>
> M. Bardy's expenses $1,000
>
> Paris costs $2,500 Total $4,000 [sic]

> "Please help yourself to the list of Paris expenses in case you have need of them. I have all justifying evidence concerning my expenses and I beg of you not to let them be misplaced as I do not know if my secretary in Paris has a copy of these expenses."

Except for the foregoing letter [Ex. 157], appellee never gave Conner any further instructions with respect to La Nouvelle Eve Corporation [T. 1845, line 14, to T. 1846, line 3].

Appellee received $37,000.00 in the form of checks drawn on the corporate account. As there was no resolution with respect to officer's salary, and under standard accounting procedure, Conner treated appellee as a corporate employee and showed the $37,000.00 as advances to employee. No taxes were deducted therefrom [T. 1839, line 10, to T. 1840, line 6; T. 1870, line 5, to T. 1871, line 2; T. 1873, line 21, to T. 1874, line 8; Ex. 513].

In July 1959, La Nouvelle Eve Corporation filed federal tax returns and paid federal taxes. Returns and taxes were also paid to Nevada agencies at the same time [T. 1881, line 4, to T. 1884, line 5, Ex. 522]. On October 2, 1959, appellee, on an Employer's Federal Tax Return form for the corporation, wrote the Internal Revenue Service regarding the corporation's show at the El Rancho Vegas Hotel and that from April 8 to June 2, 1959, La Nouvelle Eve Corporation did not receive any money [Ex. 378].

Aleta Morrison, the solo dancer in the show, was an exciting dynamic performer [T. 2575, line 21, to T. 2576, line 3]. She was the highest paid performer, receiving $275.00 per week [T. 1572, line 19, to T. 1573, line 1]. She and Janine Caire, the production singer, excelled [Exs. NB, NC-1]. Caire received the second

highest salary, $200.00 per week [T. 1573, lines 9-10]. Of the 32 performers in the show, 19 of them, including Aleta Morrison, belonged to the Charley Ballet owned by Charley Henchis, who had a contract with appellee with respect to his troupe [Exs. 57, 91; T. 1292, lines 15-24]. The Charley Ballet was a line of girls [T. 2053, lines 18-26]. Henchis hired and had British Equity contracts with all of his troupe [T. 1292, lines 20-22; T. 2055, line 17, to T. 2056, line 18]. The contracts were for six weeks, plus a four weeks option and an additional option, except for Aleta Morrison, who had a contract for six weeks plus only one four week option. Aleta Morrison had previously appeared at La Nouvelle Eve in Paris, but because of illness had left and returned to England. Appellee had requested Henchis to obtain her services for the Las Vegas opening and Henchis went to London and prevailed upon her to come to Las Vegas for six weeks plus a four weeks option. Everyone knew that she was returning to London at the end of that time [T. 2056, line 13, to T. 2058, line 24].

Janine Caire was appearing in Philadelphia when appellee called her from New York. She was hired at $200.00 per week with the promise of more money if the show went well [T. 1907, line 3, to T. 1909, line 7]. She repeatedly asked appellee for a contract, but never got one [T. 1914, lines 1-6]. She met appellant Matt Gregory in Las Vegas in January, 1959, and he became her manager [T. 1937, line 23, to T. 1938, line 5; T. 2303, line 7, to T. 2304, line 12]. He was a personal manager of performers in the entertainment industry [T. 2299, lines 9-19]. Under paragraph 11 of AGVA Rules, all performers were required to have contracts [T. 1642, lines 2-19, Gregory Ex. A]. Gregory asked appellee for a contract and a $100 a week raise, but was advised he would think about it. After appellee

left for Paris on March 6, 1959, Gregory spoke to Holmes and subsequently to Regis Durieux, who took appellee's place as manager, but received no satisfaction [T. 2309, line 22, to T. 2321, line 3].

After the four weeks option had been picked up extending the show for a total of 10 weeks ending April 7, 1959, negotiations were opened to extend the show beyond April 7, 1959. Gerber called Katleman, who was in New York, and arranged an appointment for him with appellee in Las Vegas. Appellee agreed to the meeting [T. 322, lines 7-25]. As soon as the meeting was arranged, Peter Holmes, appellee's interpreter and a dancer in the show, testified that appellee "walked out of the office and said that he was going to get on the first plane to Paris [and] did exactly that [T. 323, lines 1-13].[3] Katleman arrived three days later for the scheduled meeting and was enraged when he discovered that appellee had left [T. 323, lines 14-21].

Before appellee left he and Gerber discussed the extension and Gerber asked him if there were contracts

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[3]Appellee testified that although he had an appointment to see Katleman he left on March 6, 1959 because he wanted to prepare his Paris opening for April, but that he did see Katleman at the airport in Las Vegas when he was leaving, but they did not talk [T. 1187, line 7, to T. 1189, line 14]. He also testified that he waited three days for Katleman and could wait no longer [T. 1579, lines 21-25]. In a March 6, 1959 letter to Gerber, appellee said that "I feel it is needless that I stay to talk to Mr. Katleman" [Ex. 469]. On April 2, 1959, appellee wrote Gerber and gave his reason for leaving as follows:

> 'Therefore, Mr. Gerber, did I become angry—after coming especially from Paris—with a secretary, for five days, before signing the contract, to discuss necessary work: and upon arriving I found no one, then I was given an appointment at 10:00 A. M. in the morning but did not get the acknowledgement until 6:00 P.M. in the evening with Mr. Katleman and then he only gave me ten minutes in five days. . . . When I wanted to salute him and say goodbye upon my departure the message was sent to me that Mr. Katleman was in a conference and could not be disturbed. . . . did I express any resentment?"

in force with the performers in the show and if he could guarantee the continuance of the show as it then stood. Replacements for two manikins requested by Katleman were also discussed [T. 2500, lines 7-23]. Appellee told Gerber that he would take care of the replacements when he returned to Paris [T. 2500, lines 19-23]. He also gave Gerber, through Holmes, a letter on March 6, 1959 [T. 2488, lines 15-22] guaranteeing the extension of the contracts which letter said in part as follows:

> "You have asked me if I could guarantee the extension of contracts of the performers. Except for Miss Henriette, who will be replaced, since she only signed for ten weeks and does not wish to re-negotiate her contract, there will be no replacements. I can guarantee that the other artists will stay, and in case there should be a necessity for replacement I will take care of this from Paris."

Before he left for Paris on March 6, 1959, appellee also signed a contract between La Nouvelle Eve Corporation and appellant El Ranco Operating Co., which provided for an eight week extension commencing April 8, 1959, pursuant to the terms therein provided [Ex. 472]. Katleman was reluctant to sign the new contract on his return because he was told that Morrison and Caire might not remain with the show and he felt appellee was stalling him about the promised replacements [T. 2655, line 13, to T. 2658, line 5]. He had numerous conferences with Gerber and Gerber showed him appellee's letter guaranteeing the performers' contracts [Ex. 469] and Katleman finally signed the extension agreement about March 13, 1959 [T. 2658, line 18, to T. 2660, line 6; T. 2490, line 24, to T. 2491, line 10].

Under the extension agreement the first two shows each night were to be abbreviated versions. Joe E. Lewis was to be the star [T. 2487, line 19, to T.

2488, line 12] and "In place of the stipulated $15,000.00 weekly payment by Operator to Artist[4] . . ." as the December 1, 1958 contract provided, the Hotel would pay the Artist as full payment all the salaries and expenses of the show, including that of Henchis, and the commission to MCA and $5,000. per week to appellee [Ex. 472]. This method was used so that appellee would not have to pay taxes on the money [T. 2711, lines 8-21].

On or about March 26, 1959, Regis Durieux arrived in Las Vegas from Paris bringing a letter to Gerber and Katleman from appellee that he was the substitute for appellee to watch over the progress of the show [Ex. EJ]. Gerber was under the impression that Durieux would bring the new manikins with him and someone to replace Henriette Charmat and when he didn't Gerber wrote appellee on March 26, 1959 inquiring when they would arrive [T. 2503, lines 1-5; T. 2509, lines 2-13; Ex. 475].

At the time appellee signed the new contract on March 6, 1959, Gerber told appellee that neither Morrison nor Caire were under contract and appellee said it didn't matter, it would be taken care of [T. 1604, line 14, to T. 1605, line 1]. On March 13, 1959, appellee wrote Holmes confidentially: ". . . Concerning Aleta, if she does not continue after the ten weeks agreed upon, and if Charley asks you for her return trip, you will tell him, 'See Mr. Bardy, since he hasn't given me any instructions concerning Miss Aleta Morrison.' Don't bring up these questions if Charley doesn't talk to you about them." [Ex. 191]. On March 24, appellee wrote to Holmes taking the position that Katleman was annoying him and that if Katleman "continued to make demands he would put another French show in a com-

[4]"Artist" in the December 1, 1958 contract was La Nouvelle Eve Corporation [Ex. Hotel D].

peting establishment and preclude Katleman from getting any other French show from Paris by going to the local union." He requested Holmes to obtain the name of a good Las Vegas lawyer. He said he would not replace the manikins [Ex. 207]. Gerber spoke to Holmes or Durieux at least four or five times a day about the Morrison and Caire contracts and they told him not to worry and that appellee would be in Las Vegas on April 6, 1959. He also attempted to get Morrison to remain after April 7, but she told him of her reasons why she had to return home and that appellee was aware of them [T. 2509, line 24, to T. 2511, line 14].

Appellee testified he was aware on March 25th or 26th that Katleman was contemplating closing the show after April 7, 1959, if the problems were not corrected [T. 1617, lines 17-20]. On March 31st Durieux wired appellee that "situation grave" and requested appellee to telephone him [T. 1621, lines 11-16; Ex. 212]. Appellee wired Durieux the same day "No use telephoning. Situation will perhaps be grave April 8. See Peter for attorney. Have complete confidence in American justice." [T. 1622, lines 17-22; Ex. 220].

On April 1st, Gerber wrote Katleman at the latter's request that he had not heard from Bardy with regard to the replacements [T. 2505, lines 2-9; Ex. 222]. Caire and Morrison also wrote letters stating they would not appear after April 7 [Ex. 222]. Tom Douglas, the hotel producer, had also written a letter stating that several members of the cast did not wish to remain beyond April 7th [Ex. 222].[5] Around April 1st, Katleman

[5]The authenticity of this letter is in dispute [T. 469, line 13, to T. 474, line 5]. Douglas did know that Morrison was returning to London after April 7 and she was a house guest in his home in Los Angeles before she returned to London [T. 1989, line 10, to T. 1990, line 16].

told Haettel, the local AGVA representative, that Caire and Morrison did not have contracts to perform after April 7 and he told Katleman nothing could be done at the time. Haettel questioned Caire and Morrison and they verified that they had no contracts [T. 2141, line 25, to T. 2144, line 18]. He testified that under AGVA rules all performers had to have written contracts [T. 2146, lines 4-19].

On April 7th, Caire told Durieux she would not perform on April 8th [T. 286, lines 2-9]. She was upset and after the last show on April 7th, Gregory drove her and Morrison to Los Angeles where they were checked into a hotel [T. 2322, line 11, to T. 2324, line 9].

On March 31st, appellee sent a letter to Holmes giving him complete instructions as to what to do on the night of April 8th such as ". . . Present yourself, with the troop on April 8 and 9, accompanied by a Bailiff . . . Better do not pack the costumes. We are supposed to continue . . . For Henriette [Charmat] let her obtain a doctor's certificate stating she is sick. This could serve our purpose eventually . . ." He also instructed him to make an appointment for Durieux to visit the French Consul in Los Angeles on April 9th [T. 1585, line 13, to T. 1591, line 26; Ex. I]. On April 6th, appellee wired Gerber that if there was a termination of the contract he would sue [Ex. 239].

On the night of April 8th Holmes offered to do the part of Caire in the show, including singing the same songs, and Jennifer Till, a dancer in the show was to do Morrison's act [T. 278, line 5, to T. 279, line 14]. A Hotel security guard advised the show could not go on [T. 1224, lines 7-22]. Present was Russell B. Taylor, a Las Vegas attorney, together with a local constable, while a roll call was taken of the troupe [T. 1217, line 1, to T. 1221, line 3]. His law firm had been retained by La Nouvelle Eve Corporation [T. 1241, line 24, to

T. 1242, line 7]. The firm was paid by a corporate check [Ex. 529 ABR]. He had a typewritten roster of the cast which had at the top the words "La Nouvelle Eve Corporation". He had been retained on April 8th and informed that there might be a claim of anticipatory breach of contract by reason of absence of members of the cast [T. 1245, line 18, to T. 1250, line 16].

Instead of the La Nouvelle Eve show, Monique Van Vooren and Jack Wallace performed. Wallace had previously been hired by the Hotel to replace George Matson, one of the specialty acts, and Van Vooren had been standing by if the show had to be replaced [T. 2535, line 25, to T. 2536, line 12; T. 2668, lines 8-20].

Haettel was requested to give a ruling for AGVA, but he told Gerber, Henchis, Katleman, Holmes and attorney Taylor that he would wait until Irvin P. Mazzei, the Western Regional Director of AGVA arrived the next day [T. 2519, line 18, to T. 2520, line 15]. Mazzei, who was in Salt Lake City, was called and arrived in Las Vegas on the night of April 9th [T. 2214, line 21, to T. 2216, line 14]. Continuous meetings were held for two and one-half days with Katleman, Gerber, Henchis, Holmes and Haettel. During this period Mazzei did not sleep [T. 2221, lines 1-21].

Katleman insisted to Mazzei that there was a breach and Mazzei said that if it was protested it would have to be submitted to arbitration and he was risking eight weeks' expenses and Katleman said he would take the chance [T. 2226, lines 9-25]. Mazzei told Holmes that unless the troupe was paid salary he had no alternative but to make arrangements for transportation back to Paris [T. 2225, lines 1-20]. Mazzei said that it was AGVA's position that the dispute could only be settled in arbitration and that we could only make demands that the kids be paid or returned to France [T. 2252, lines 8-12].

On April 9th Holmes said he would try to contact appellee and in Mazzei's presence placed the call. Holmes told Mazzei that appellee was not available, but could be reached within three hours. The call was replaced and Holmes was advised that appellee would not be available until the afternoon of April 10th [T. 2228, line 5, to T. 2230, line 25].

Durieux had cabled appellee on April 8th that the troupe was not working, AGVA declared the troupe incomplete and appellee should contact Jackie Bright [Mazzei's superior] in New York [Ex. 244]. On April 9th appellee sent a wire to Durieux that his representative would be in Las Vegas Monday (April 13th) and to be present every night with the troupe and a bailiff [Ex. 260]. On April 10th appellee sent Durieux a "confidential" cable stating the trip of his representative was cancelled, attorney should be instructed to ask for execution of contracts and return troupe [Ex. 269]. The same day Gerber wired Stein in Paris that appellee's presence might have saved the situation and the only alternative was to make arrangements to return the troupe [Ex. 264].

The show which opened on April 8th did no business and the Hotel was losing money. Monique Van Vooren had never appeared as a soloist or star in a Las Vegas show. Because of the shortness of time, Katleman was unable to get a line of girls to back her up. As a result Katleman agreed that the show could come back starting April 15th in a modified form and the Hotel would pay all expenses plus $2,000.00 per week to appellee [T. 2667, line 16, to T. 2668, line 24; T. 2538, line 11, to T. 2539, line 2]. Durieux agreed to call or cable appellee with respect to the proposition and apparently did reach him on the phone [T. 306, line 2, to T. 307, line 5].

On April 11th appellee wired Durieux "Impossible to give authorization to sign prior to confirmation of MCA requested by cable" [Ex. 272]. The same day appellee wired Gerber "Regis informs me new propositions Katleman please confirm directly immediately by cable extremely important" [Ex. 270]. The same day Gerber wired appellee confirming the proposition and advising acceptance [Ex. 271].

After appellee's return to Paris on March 6th, Madame Deryckere saw him every day at his apartment. Stein called appellee many times, but appellee would not talk to him. She relayed Stein's message to appellee [T. 1756, line 20, to T. 1759, line 21]. Appellee told her to wire Durieux "I agree for $2,000 or $2,500" and she sent the wire from appellee's telephone in his apartment [T. 1767, line 14, to T. 1770, line 20].

On April 11th or in the early morning hours of April 12th, Durieux, through Holmes, informed Gerber that the proposition was acceptable to appellee [T. 2539, lines 13-17] and the show went back into rehearsal. A new contract was prepared. Durieux said he had authority to approve, but not to sign it. It was sent to appellee, but never returned [T. 2577, line 11, to T. 2578, line 3]. A meeting of the cast was held, at which new plans were explained. Mazzei spoke to the cast and told them AGVA would rule they were entitled to half salary for one week or alternatively they could return to Paris or work elsewhere [T. 2544, line 21, to T. 2545, line 15]. Some accepted the half salary, which was advanced by the Hotel [T. 2665, line 6, to T. 2666, line 8]. Some of the cast returned to Paris and others went to work elsewhere and the show began on April 15th with at least nine or ten less performers than it had before [T. 2546, lines 5-19]. On April 15th, Durieux wired appellee that the troupe went back to work that day [Ex. 284]. The show continued through June 2,

1959 with a cut version [T. 315, line 18, to T. 316, line 2]. It was completely revised. Till did not do the Morrison part [T. 295, lines 9-21]. Caire appeared in the show until June 2, 1959. She received $300 per week pursuant to the terms of an AGVA contract with the Hotel dated April 12, 1958 [T. 2325, line 25, to T. 2326, line 5; Ex. 275].

After June 2, 1959, the remaining personnel in the show returned to Paris [T. 2036, lines 4-22]. La Nouvelle Eve was closed for repairs. Appellee could not be found [T. 2039, line 2, to T. 2040, line 17]. Before leaving Las Vegas Henchis attempted to reach appellee by phone, but was unable to do so. He also cabled appellee from Las Vegas, but received no reply. Upon his return to Paris his lawyers were also unable to reach appellee [T. 2041, line 12, to T. 2043, line 16]. Henchis was told by people in Paris that La Nouvelle Eve would not reopen because of tax problems [T. 2047, line 8, to T. 2048, line 10].

After the show closed in Las Vegas on June 2, Henchis called Gregory from Paris and informed him that he was afraid he would not have work for his line of girls in Paris [T. 2332, lines 1-25]. Gregory flew to Paris and a contract dated June 8, 1959, and signed later, was entered into whereby Gregory would book the Charley Ballet in the United States [Ex. 334; T. 2329, line 16, to T. 2330, line 6]. The Charley Ballet was booked into the Hotel and appeared there from July 29, 1959 through October 21, 1959. It was billed as "Les Girls de Paris," not as a major attraction, but solely as a line of girls on the bill. The star of the show was Joe E. Lewis. The show was entirely different in all respects from the prior shows [T. 2093, line 19, to T. 2094, line 10]. The show was advertised as "La Nue (nude) Eve." [Exs. 109, 141a, 141b, 141c].

Specification of Errors.

1. The Court below erred in denying appellants' motion for a directed verdict on the ground that the Nevada fictitious name statute (N.R.S. Chapter 602) barred appellee's claims.

2. The Court below erred in not submitting to the jury the issue of whether appellee was "transacting business" in Nevada within the meaning of the Nevada fictitious name statute (N.R.S. Chapter 602).

3. The Court below erred in ruling that appellee was not estopped to deny the corporate existence of La Nouvelle Eve Corporation.

4. The Court below erred in not submitting to the jury the issue of whether appellee should be estopped to deny the corporate existence of La Nouvelle Eve Corporation.

5. The Court below erred in denying appellants' motion for a directed verdict on the ground that appellee was not the proper party in interest and that indispensable parties were not joined.

6. The Court below erred in not ruling that the December 1, 1958 and March 6, 1959 contracts were unambiguous with respect to who the contracting parties were.

7. The Court below erred in refusing to instruct that there was no evidence that the appellee owned the night club in Paris.

8. The Court below erred in admitting in evidence assignments to appellee of rights and claims, which assignments were executed after the action was commenced, and objection to which was made ". . . on the ground that it is not within the scope of the cross-examination; it is immaterial and irrelevant; that if the assignments, which they purport to be, the assignments would have to be dated prior to the commencement of the action." [T. 1646, lines 5-9].

9. The Court below erred in ruling as a matter of law that appellee was not required to arbitrate before commencing this action.

10. The Court below erred in refusing to instruct the jury that evidence of the alleged conspiracy had to be clear and convincing.

11. The verdict against appellant El Ranco Hotel Operating Co. for breach of the December 1, 1958 contract is not supported by any evidence.

12. The conspiracy verdict is not supported by any evidence.

13. The Court below erred in denying appellants' motion for a directed verdict with respect to appellee's claim under the Lanham Act on the ground that a naked claim of unfair competition did not come under the Lanham Act.

14. The Court erred in instructing the jury on the issue of damages with respect to trade name infringement under the Lanham Act by instructing that on the conspiracy issue it could consider damages suffered by reason of injury to the reputation of the trade name La Nouvelle Eve and by reason of confusion as to the source of production in violation of appellee's rights as owner of such trade name.

15. The misconduct of appellee's counsel in apprising the jury on the tax consequences of a verdict in favor of appellee was prejudicial error.

16. Appellants El Ranco, Inc., El Ranco Hotel Operating Co. and Beldon R. Katleman were not liable for conspiracy.

17. The Court's conduct in permitting appellee to testify without foundation to broad conclusions, the constant interruption of the cross-examination of the appellee and the limitation of such cross-examination and the Court's impatience with respect thereto, the

constant interruption of appellant Gerber's direct testimony and his cross-examination during such direct testimony and the misconduct of appellee's counsel deprived appellants of a fair trial.

18. The Court below erred in denying appellants' motion for a mistrial on the ground that appellee was permitted to testify to broad conclusions and that by reason of the Court's conduct the jury could have inferred that the burden of proof was on the appellants.

19. All specifications of error contained in the brief of co-appellants and to which reference is hereby made.

Summary of Argument.

The Nevada fictitious name statute (N.R.S. Chapter 602) requires persons carrying on or transacting business in Nevada under an assumed or fictitious name or designation to file a sworn fictitious name certificate. The statute bars a person who fails to file such certificate from commencing a suit "upon or on account of any contract made or transaction had under such fictitious or fanciful name or designation, nor upon or on account of any cause of action arising or growing out of the business so carried on under such name or designation." The appellee filed no certificate. The evidence shows that appellee carried on and transacted considerable business in Nevada under the name La Nouvelle Eve Corporation. Therefore, the statute barred him from suing on the December 1, 1958 contract. It also barred the conspiracy claim because it was one allegedly "arising or growing out of the business" carried on under the fictitious name. Appellants' motion for a directed verdict on the issue should have been granted or at least the issue of whether appellee transacted business within the meaning of the statute should have been submitted to the jury.

Under the doctrine of estoppel to deny corporate existence a person who holds a business out as a corporation is estopped to deny the existence of that corporation and cannot sue individually on claims arising in favor of such a corporation even though it has no legal existence. Both the December 1, 1958 contract upon which appellee was awarded a verdict for its alleged breach and the March 6, 1959 contract out of which the alleged conspiracy arose were executed by appellee on behalf of La Nouvelle Eve Corporation, a Monte Carlo corporation, which appellee testified he intended to form so as to save taxes. Although he apparently never did form such a corporation, he nevertheless conducted considerable business over a period of time under such name, entered into various agreements under that name and invariably used in front of his name, the letters "P.P." or "P.O.", each of which, under French law, designates the signer is executing in a representative capacity. All of the transactions of the show in Las Vegas were carried out in the name of La Nouvelle Eve Corporation and everyone dealing with the show regarded it as a corporation, including its accountant and various state and federal agencies. Appellee is experienced in corporate dealings and has formed and dissolved numerous French corporations which he controlled through the device of blank stock powers from stockholders of record who purchased the stock with his money. In view of appellee's background, his holding out the business which came to Las Vegas as a corporation and the considerable business transacted in that name, he is estopped from contending that La Nouvelle Eve Corporation did not exist and that the claims alleged belonged to him personally and not to such corporation. Again, at the very least, the estoppel question should have been submitted to the jury.

The December 1, 1958 and March 6, 1959 contracts were unambiguous with respect to the contract-

ing parties. Those parties were La Nouvelle Eve Corporation and appellant El Ranco Hotel Operating Co. Under such circumstances the Court below erroneously denied appellants' motion for a directed verdict on the ground that appellee was not the proper party in interest and indispensable parties were not joined.

The nightclub in Paris was owned by a corporation (Mansart) and always operated by various tenant corporations, all of which were controlled by appellee through blank stock powers. Appellants objected to an instruction that the jury could consider on the issue of damages the claimed deprivation of appellee of performers in a show in 1959 at appellee's nightclub in Paris and requested an instruction that there was no evidence that appellee had any nightclub, which was refused. As such nightclub was not owned by appellee, and in fact a new corporation controlled by appellee (Cythere) reopened the nightclub in 1959, and the jury, in its award of damages, could have considered the claimed deprivations of performers, the failure to give the requested instruction was prejudicial error.

Over objection the Court admitted into evidence four assignments to appellee of all rights in La Nouvelle Eve Corporation, La Nouvelle Eve, Paris, La Nouvelle Eve Show, the name La Nouvelle Eve and Escarpolette (the corporation which operated the nightclub in 1958, immediately prior to the show coming to Las Vegas). The assignments also purported to assign to appellee all rights to the claims against appellants. The assignors were the liquidator of Escarpolette, Cythere, a new corporation which reopened the nightclub in 1959, the Escarpolette stockholders and Madame Derychere, appellee's ex-wife who claimed an interest in the show. All of the assignments were dated after the commencement of the action. A recent Ne-

vada decision, *Thelin v. Intermountain Lumber,* 80 Nev. 285, 392 P. 2d 626 (1964), holds assignments dated after commencement of an action do not relate back to the time of commencement of the action and the assignee under such an assignment cannot recover. Nevada law also holds invalid an assignment of a cause of action for fraud or similar tort. Furthermore there can be no assignment of claim for trade name infringement unless the good will of the business is also assigned. The admission of the assignments requires reversal because there is no way of knowing what effect the jury gave to them or any of them.

Under the December 1, 1958 contract, the contracting parties agreed to abide by AGVA By-Laws, which required arbitration of disputes prior to suit. AGVA's representative ruled that the dispute would have to be settled by arbitration. None was here sought. Decisions hold that agreements to arbitrate include tort as well as contract disputes. The Court below erred in ruling as a matter of law that appellee was not required to arbitrate.

The Court below refused to instruct the jury that evidence of the conspiracy had to be clear and convincing and instead instructed that the proof required was only a "clear preponderance". It did not define those words. Overwhelming authority requires proof in a conspiracy case to be considerably more than by a preponderance and the failure to instruct as requested was prejudicial error.

A verdict against appellant El Ranco Hotel Operating Co. for breach of the December 1, 1958 contract was returned in the sum of $27,281 which was reduced by remittitur to $24,300.66. Remittitur was based on the assumption that the jury miscomputed interest on $18,600 claimed by appellee. The sole evidence purport-

ing to support the $18,600 figure was appellee's testimony to leading questions, without proper foundation, over objection, that he was owed $18,600, but that it "can be more; it can be less. The account must be made at the end of the contract." Appellee did not handle the books nor receive any of the checks paid by El Ranco Hotel Operating Co., and in fact was in Paris during the last month the contract ran. According to the records of the accountaint for La Nouvelle Eve Corporation there was no money owed on the contract. Furthermore, although performance was an issue provided for in the Pre-Trial Conference Order, the only evidence offered on the issue was an affirmative answer, over objection, to the question ". . . did you perform all contracts between you and the El Rancho Vegas Hotel?" Moreover there was no contract in evidence between appellee and the named hotel. Manifestly such evidence dos not support the verdict on the claim for breach of contract.

Nevada law, which is here applicable, is unusually strict with respect to proof of damages, requiring substantial evidence as to the amount of damage. A recent Nevada decision, *Knier v. Azores Construction Co.*, 78 Nev. 20, 368 P. 2d 673 (1962) reversed a damage award in favor of a motel owner based on delay in moving and rehabilitating a motel on the ground that there had been no established business based on the loss of profits for such a length of time as to make the loss of profit reasonably ascertainable. Here appellee never introduced one iota of evidence as to what he had ever learned and the Court below even commented to such effect. He had no established business. All prior corporations which ran the nightclub in Paris were evicted or dissolved. Thus, under Nevada law there existed no proof of damages to sustain the conspiracy award.

No cause of action exists under the Lanham Act for acts of unfair competition which do not involve infringement of a federally registered trademark or an unregistered trade name. *Shaffer v. Coty, Inc.,* 183 F. Supp. 662 (S.D. Cal. 1960). La Nouvelle Eve was neither. It was merely the name of a nightclub in Paris, and was not connected with any business, except corporations which were evicted or were dissolved and a new corporation which reopened the nightclub in September, 1959. Therefore, it was not protected under the Lanham Act. The Court below denied a motion for a directed verdict on appellee's claim under the act and instead instructed that damage to the *trade name* La Nouvelle Eve could be considered on the conspiracy issue. This was error.

Appellee's counsel had been repeatedly warned during trial not to make "speeches". Nevertheless, during final argument by MCA counsel he made a "speech" in which he apprised the jury that a verdict in favor of appellee would be taxable. It is well settled that it is improper for counsel to do so. Here it was deliberate misconduct and could well have played a large part in the enormous verdict.

Argument with respect to conspiracy issues is contained in co-appellants' brief. The only phase here argued is that the conspiracy claim is premised on what occurred on April 8, 1959, and events occurring shortly prior thereto resulting in the non-appearance of Morrison and Caire on that night. Even assuming the Hotel and Katleman were in some way involved in their absence, there could only be a breach of contract claim.

No cause of action exists against a party to a contract for conspiracy to breach the contract. Furthermore, the appellee was well aware that Morrison was returning to London and Caire would not perform without a contract and a raise, yet he did nothing about it. He had guaranteed their performance and was well aware for sometime that their nonappearance would be interpreted as a contract breach. He precipitated the entire situation on April 8, 1959, preparing either for Katleman to back down and have the show to go on or for litigation. He later agreed to an abbreviated show at a lesser fee and then backed off. Under such circumstances there was no conspiracy.

This case was tried in Carson City, Nevada, approximately 450 miles from Las Vegas where it was filed and where counsel for appellants and appellee practiced. No party or witness resided in or near Carson City. The case was transferred there for trial on short notice. Argument concerning the place of trial is treated in co-appellants' brief. Besides the obvious difficulty of trying a lawsuit under such circumstances counsel was under considerable pressure by the Trial Judge to speed up the trial. The Court admitted such pressure but stated there was pressure on him to complete the trial because another judge needed the court. During the direct examination of appellee, the Court permitted him to answer broad leading questions without foundation of any kind, some of which were propounded by the Court itself. A mistrial was requested by reason of the Court's conduct on such examination, but the motion was denied. The cross-examination of appellee, portions of

which are contained in Appendix "A" hereto, was constantly interrupted by the Court, the Court sustained its own objections to questions asked, it took control of the cross-examination on numerous occasions, charged counsel with being unfair to the witness, advised in effect that appellee had not been discredited and on many occasions, by its questions and other remarks, made it appear that appellee's peculiar corporate and financial dealings were proper because they were done for "tax purposes". The cross-examination was itself limited both in scope and in time. The Court constantly pressured appellants' counsel to stipulate facts, thus depriving the jury of the opportunity to observe appellee's demeanor. During appellee's cross-examination, his counsel frequently interrupted to make demands and "speeches" and offers to stipulate. On several occasions he made unethical remarks concerning the signature of Katleman. Those actions impeded greatly appellee's cross-examination and resulted in a denial of such right. The direct examination of Gerber was constantly interrupted by both the Court and appellee's counsel. The Court conducted extensive cross-examination of Gerber during the course of his direct examination. These actions on the part of the Court and appellee's counsel deprived appellants of a fair trial.

ARGUMENT.

I.

Appellee Has No Standing to Bring This Action Because He Has Not Complied With the Nevada Fictitious Name Statute and He Is Estopped to Deny That La Nouvelle Eve Is a Corporation.

The purpose of a fictitious name statute is to have a public record made of the individuals doing business under a fictitious name with such definiteness and particularity that those dealing with them may at all times know who are the individuals with whom they are dealing, or to whom they are giving credit or becoming bound. *Andrews v. Glick,* 272 Pac. 587 (Cal. 1928); *Hixon v. Boren,* 301 P. 2d 615 (Cal. 1956). It is to prevent fraudulent trading. *Ray v. American Photo Player Co.,* 189 Pac. 130 (Cal. 1920).

The doctrine of estoppel to deny corporate existence is based upon the principal of fairness, good faith and justice. *Casey v. Galli,* 94 U.S. 673, 680 (1877).

Before going into each of the above defenses, it is appropriate to examine into the nature of the dealings of appellee prior to the events here involved as well as those presented to this Court, because such examination will assist the Court in its consideration of the application of those defenses.

Despite the limitations on cross-examination into appellee's dealings during the years preceding the transactions here involved (See Appendix "A"), it is clear that appellee rarely dealt in his own name with respect to any matter in which there could be personal liability. He used other persons' names to form innumerable corporate entities to exploit the night club in Paris

and he would have such entities dissolve or go out of business when convenient to him. He controlled those entities through blank assignments from the persons to whom he gave money to purchase corporate stock.

Appellee has had tax problems in France since 1953 resulting from the operation of the club and its income and he has been in long litigation with the fiscal authorities. Appellee testified that the problems arose because *"The administration thinks that I am the owner."* [T. 1382, line 5, to T. 1384, line 21]. Surely that is astounding testimony and most revealing. In the French court appellee takes the position he does not own La Nouvelle Eve. In the American Court he claims he owns La Nouvelle Eve.

It is interesting to note that in appellee's letter [Ex. 505], which apparently accompanied a January 16, 1959 letter to Jackie Bright [Ex. 504], he had Holmes append a postscript stating as follows:

> "Mr. Bardy wishes me to include a point which I omitted in the second paragraph. Although he has always occupied the salaried position of artistic director, it must be remembered that during his stay there it has been exploited by several different societies.
>
> "During those periods, his position has been that of director, licensed by the Ministry of Fine Arts, and his views have not necessarily reflected those of the society."

The second paragraph which the postcript referred to stated that American artists had worked for "me" at La Nouvelle Eve and appellee was very circumspect so as to make certain no one thought he was the owner.

The January 16th letter to Bright itself is most illuminating. It informs Bright that he expects difficul-

ties with Katleman upon his arrival in Las Vegas and that he had sent two signed contracts to Las Vegas, but no confirmation from the *Operator*[6] had been received and that later a contract signed by Katleman was received, which he signed in good faith upon assurances it was the same as the others, but that after he had it translated he discovered the main clause providing for an advance of $15,000.00 was missing. None of the contracts he signed ever provided for such advance [Exs. 90, 90 A, D]. Nor is there any evidence that such advance was ever discussed or considered. This letter was sent on the heels of the Hotel advancing $12,000.00 for transportation about a week before the troupe arrived on January 19th or 20th, because appellee had no money for such purpose. Nevertheless, the Hotel also advanced the $15,000.00 [T. 2654, lines 4-22, Ex. Q].

As a result of appellee's tax problems, he is under some form of governmental arrete or interdit which prohibits him from exercising a commercial or industrial occupation. Even his driver's license has been withdrawn [T. 1382, line 9, to T. 1383, line 19; T. 1569, lines 14-25]. He may even be barred from access to French courts [T. 1385, lines 17-23].

Mansart's eviction of Nartella and its subtenant Societe Gerance de la Nouvelle Eve, even though he controlled all these corporations, indicates the sharp dealing of appellee. So, too, does the reopening of the club under Escarpolette and its subsequent dissolution.

The dissolution resolution adopted by Escarpolette stated it was unable to pay its rent to Mansart and it

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[6]The use of the word "Operator" by appellee is significant, because in the December 1, 1958 contract, as in the prior drafts, the contracting parties are "Operator" and "Artist", respectively, and in the drafts the "Artist" is either La Nouvelle Eve or La Nouvelle Eve Corporation [Exs. 90, 90A] and in the December 1st contract, La Nouvelle Eve Corporation [Ex. D].

was threatened with eviction by Mansart [Ex. 13]. The dissolution on December 1, 1958, was motivated, in all likelihood, by the contract to come to Las Vegas and was apparently a means to avoid payment of Escarpolette creditors, because at the time of its dissolution, Escarpolette "had no property and no assets" [T. 1452, lines 5-20]. Can there be any doubt as to the reason appellee controls Mansart through blank assignments?

Madame Deryckere testified that appellee used many societies to operate the club so he could cheat with his taxes and to have other people involved if there were trouble [T. 1781, lines 1-23].

Henchis testified that appellee always used different corporations and he always had to look to see what name was on a contract with appellee and that the girls in the Las Vegas show had contracts in the name of a Monte Carlo corporation [T. 2073, lines 10-25]. When appellee put on a show at the Brussels World's Fair in 1957 or 1958 and Henchis provided a line of girls, the show was a flop and four days after it opened appellee left and no one could find him and Henchis was not paid and had to pay his own girls [T. 2071, line 14, to T. 2072, line 20]. Appellee lives in furnished apartments and moves several times a year so that his creditors cannot reach him [T. 2077, lines 1-12].

The use of Madame Deryckere and Tanya Floria to obtain author's royalties demonstrates the sharp dealing of appellee. So does his letter to Holmes on March 31, 1959, instructing him to have Henriette Charmat, who was returning to Paris after April 7th "obtain a doctor's certificate stating she is sick. This could serve our purpose eventually" [Ex. I].

Truth appears to mean little to appellee. His testimony as to the various reasons he left Las Vegas immediate-

ly after a meeting was arranged requiring Katleman to come from New York shows how little regard he has for the truth. His testimony with respect to the use of the letters P.P. is revealing. At first he testified it meant for himself and for his artists and not indicating agency [T. 1471, line 14, to T. 1472, line 5]. When questioned by the Court he testified the letters meant nothing in French and as far as he was concerned it was an abbreviation for himself and he didn't know whether others in France used P.P. [T. 1474, line 5, to T. 1476, line 6]. He subsequently admitted he used the letters in front of his name when he signed for Escarpolette [T. 1480, lines 1-2]. Can there be any doubt but that he used P.P. in front of his name under the words La Nouvelle Eve Corporation on the December 1, 1958 contract [Ex. D] so that he would not be personally liable in the event of a suit on the contract?

Appellee is a litigious person, and while that fact may not in itself be a vice, it is some indication that appellee will seek to utilize every technicality possible. Beatrice Munson, one of appellee's witnesses, testified that though she had signed a contract for the Las Vegas show, she never received a copy, and after she returned to Paris, appellee commenced a proceeding against her on the ground of breach of that contract in not returning to Paris after April 7th, and after she paid him $100.00 nothing further was done [T. 799, lines 10-20; T. 786, line 2, to T. 787, line 17]. He sued Henchis in France on May 26, 1959 [Ex. 337]. He sued MCA in France as early as May 6, 1959 in behalf of himself and of Escarpolette [Ex. 310].

The foregoing facts present a proper background for consideration of the fictitious name and estoppel to deny corporate existence defenses.

A. Appellee's Action Is Barred by the Nevada Fictitious Name Statute.

N.R.S. 602.010 provides as follows:

> "Every person, firm and partnership conducting, carrying on or transacting business in this state under an assumed or fictitious name or designation which does not show the real name or names of the person or persons engaged or interested in such business, must file with the county clerk of each county in which the business is being carried on, or is intended to be carried on, a certificate containing the information required by NRS 602.020."

N.R.S. 602.070 provides as follows:

> "No action may be commenced or maintained by any person, firm or partnership mentioned in NRS 602.010, nor by his or their assignee, upon or on account of any contract made or transaction had under such fictitious or fanciful name or designation, nor upon or on account of any cause of action arising or growing out of the business so carried on under such name or designation, unless he or they, prior to commencement thereof, shall have filed the certificate required by this chapter."

At the pre-trial conference the Court below indicated it would rule the statute inapplicable [Rep. Tr. of Pre-Trial Conference Proceedings 304]. Upon appellant's motion for a directed verdict based on the statute the Court ruled, as a matter of law, that appellee was not required to comply with the statute [T. 2738, lines 2-12]. Appellants contend that as a matter of law the statute is applicable and in any event a fact question was presented which should have been submitted to the jury.

It is admitted that appellee never filed a fictitious name certificate in accordance with the statute [R. 1827, lines 12-14].

The evidence reveals the following business activities with respect to the La Nouvelle Eve show in Las Vegas:

(1) Appellee hired MCA Artists Ltd. as his agent, which agent negotiated in Las Vegas, Nevada, with appellants El Ranco Hotel Operating Co. and Katleman to sell El Ranco Hotel Operating Co. the La Nouvelle Eve show [Ex. 449].

(2) In October 1958, appellee negotiated in Las Vegas with appellants El Ranco Hotel Operating Co. and Katleman with respect to a contract calling for the performance of the show in Las Vegas [T. 2417, line 6, to T. 2421, line 17].

(3) Thereafter, the show's agent MCA Artists Ltd., negotiated further in Las Vegas, with said appellants with respect to said contract [T. 2427, lines 12-24].

(4) The agent, MCA Artists Ltd., had an office in Las Vegas, Nevada, headed by appellant Gerber [T. 2352, line 22, to T. 2353, line 9].

(5) The December 1, 1958 contract was executed by appellee providing for ten weeks' performance, including option, in Las Vegas [Ex. D].

(6) Appellee hired Conner, a Las Vegas accountant, to handle the financial affairs of the show, including the collection of weekly checks for the show's performance and the paying of weekly show payrolls. Conner was told by appellee to use La Nouvelle Eve Corporation as the name of the business [T. 1819, line 18, to T. 1821, line 3].

(7) A bank account was opened in Las Vegas under the name La Nouvelle Eve Corporation and hundreds

of checks were drawn thereon for payroll, bills accumulated in Las Vegas, and to pay state and federal agencies, all as a result of the operation of the show in Las Vegas [T. 1837, line 4, to T. 1838, line 6; T. 1547, line 13, to T. 1548, line 18].

(8) With the knowledge of appellee, Harold Conner negotiated for La Nouvelle Eve Corporation with the Nevada Employment Security Department, the Nevada Industrial Commission, and the Treasury Department in connection with operations of the show in Las Vegas [T. 1838, lines 7-24; T. 1876, line 1, to T. 1880, line 1].

(9) As a result of such negotiations, money was paid in the form of La Nouvelle Eve Corporation checks, sent from Las Vegas, Nevada, to each of the said agencies [T. 1838, lines 7-24].

(10) The show hired two or three wardrobe women and a manikin in Las Vegas, Nevada, for the show in Las Vegas, Nevada [T. 2571, lines 1-18].

(11) A collective bargaining agreement was negotiated and entered into with AGVA in Las Vegas, Nevada, with respect to the personnel in the show under the name La Nouvelle Eve Corporation [Ex. 105].

(12) Appellee resided in Las Vegas, Nevada from about the middle of January, 1959 to March 6, 1959, for the purpose of supervising the show, and thereafter had representatives in Las Vegas, Peter Holmes and Regis Durieux, to take care of the show.

(13) At all times Gerber, of Las Vegas, was the show's representative in Las Vegas.

(14) Gerber attempted to sell the show to the Mapes Hotel in Reno, Nevada, to appear after it left the El Rancho [T. 2573, line 16, to T. 2574, line 21].

(15) Gerber also tried to sell the show to prospective purchasers in various cities in the United States outside the State of Nevada [T. 2483, lines 5-17].

(16) A new contract with El Ranco Hotel Operating Co., dated March 6, 1959, providing for eight additional weeks of performance of the show in Las Vegas, commencing April 8, 1959, was entered into in the name of La Nouvelle Eve Corporation [Ex. 472].

(17) Las Vegas attorneys were retained in connection with the show, said counsel testifying that he was retained by the management of La Nouvelle Eve Corporation [T. 1241, line 24, to T. 1242, line 7].

(18) Appellee negotiated with his artists with respect to contracts and extensions of contracts concerning services to be performed in the show in Las Vegas. Henchis testified those contracts were in the name of a Monte Carlo corporation [T. 2073, lines 11-25].

(19) In the summer of 1959 appellee spoke to Lou Walters, a Las Vegas producer, and had him try to sell the show to hotels in Las Vegas, Nevada [T. 949, line 12, to T. 951, line 19].

(20) Appellee's damage claims are predicated on inability to have the show presented in Las Vegas where other French shows appeared for long runs.

(21) At the time of the presentation of the show in Las Vegas, Appellee had no show or business elsewhere. As a matter of fact, there is no credible evidence that he personally ever had any business anywhere except that he was producer of shows at La Nouvelle Eve in Paris and the last production (Shocking) was put on in 1958 by Societe l'Escarpolette and that corporation was evicted because of non-payment of rent in December 1958.

(22) On April 24, 1959, La Nouvelle Eve Corporation wrote AGVA claiming $14,000.00 held by AGVA for transportation [Ex. N].

The Nevada fictitious name statute gives no control to state authorities over the individual as does the usual

state statute which requires foreign corporations to qualify. Such statutes, in order to square with constitutional requirements, require the foreign corporation to "do business" within the state before coming into play. The Nevada statute does not use the words of art "doing business." In this regard it is interesting to note that in California, which requires a person "transacting business" under a fictitious name to file and publish a certificate (C.C. 2466) and where no action can be maintained by a person "doing business under a fictitious name . . . upon or on account of any contract made, or transactions had, under such fictitious name" (C.C. 2468) until a certificate is filed, it has been held that one contract only can constitute transacting business. *Ray v. American Photo Player Co., supra; Moon v. Martin,* 197 Pac. 77, 78 (Cal. 1921).

The mentioned California statutes are different from Nevada's in that Nevada's is a jurisdictional statute which specifically enjoins *commencement* of an action where there has been no compliance. The strictness of the Nevada statute is further demonstrated by its preclusion of commencement of an action by an assignee (N.R.S. 602.070) and noncompliance is a misdemeanor (N.R.S. 602.070).

At the time of the pre-trial hearing the Court held that in its opinion N.R.S. 602.070 did not apply because the appellee was engaged in an isolated transaction and that the issue would not be submitted to the jury. Appellants contend that not only did the evidence demonstrate no isolated transaction and, in fact, rather considerable business done under a fictitious name as shown above, but even if either the contract of December 1, 1958 or the contract of March 6, 1959, extending the show for eight weeks, was the only contract involved, appellee would be precluded herein.

Although the many activities of the appellee under a fictitious name were more than sufficient to have required appellee, if he had been a foreign corporation, to have qualified in Nevada under the criterion laid down in foreign corporation "doing business" decisions, it is manifest that under Chapter 602 the making of a contract or having a single transaction under a fictitious name requires the filing of a certificate. If this were not true why would the legislature bar recovery "upon or on account of *any* contract made or transaction had under such fictitious name"?

Of import here is the fact that not only does Nevada preclude actions upon or on account of *any* contracts or transactions, it also precludes actions "upon or on account of any cause of action arising or growing out of the business so carried on under such name or designation." Thus, it is apparent that Nevada intended to preclude non-compliers from commencing not only actions on contracts or other transactions, but all actions having anything to do with the business carried on under the fictitious name.

This intention is demonstrated by the history of the statute. The first appearance in Nevada statutes of fictitious name certificates appears to be Statutes, 1887, 46, which required partnerships to file certificates. It barred partners doing business contrary to the statute from maintaining "any action upon, or on account of any contracts made or transactions had in the partnership name."

In 1923, the 1887 act was repealed and a new act, covering persons, firms and copartnerships was enacted (Stats. 1923, 271). Section 7 thereof provided that persons who did not comply would not "be allowed to commence, maintain or defend any action or proceeding . . . upon or on account of any contract made,

or transaction had, or liability incurred, under such fictitious or fanciful name or designation, *or cause of action arising or growing out of the business so carried on under such name.*" (Emphasis supplied). Section 7 was amended in 1925 (Stats. 1925, 44) so as to contain the language now contained in N.R.S. 602.-070, which was the 1957 codification.

The reason for the insertion of the language added in 1923 is interesting in the light of *Reeves v. First Nat. Bank of Oakland,* 129 Pac. 800, 801 (Cal. 1912), in which damages were sought for failure of defendant bank to honor a check. The California Supreme Court held that the action sounded in tort and the failure to file a partnership fictitious certificate did not prevent its maintenance. Of interest is the language of the Court:

> ". . . Besides, this suit did not grow out of any contract made or transaction had in plaintiffs' partnership name."

This language is significant in view of the language in the 1923 amendment, which came into being after the *Reeves* decision. It is plausible to conclude that the part of the amendment barring suits arising or growing out of the business carried on had some relation to the *Reeves* decision in the adjoining State of California. Whether or not it did, the language is clear and unequivocal, *Cf., Pendarvis v. U.S.,* 241 F. Supp. 8 (E.D. S.C. 1965), which held that negligent army medical treatment of a civilian after being assaulted by soldiers on maneuvers did not give rise to an action under the Federal Tort Claims Act because the Act excluded recovery for "any claim arising out of assault, battery, false imprisonment or arrest."

Language similar to N.R.S. 602.070 was involved in *Sanquin v. Wallace,* 234 P. 2d 394 (Okla. 1951), in

which the Oklahoma Supreme Court held that the statute prevented partners from recovering damages to the partnership as a result of an encroachment on the building used by the partnership.

No question appears to exist with respect to recovery by appellee under the contract of December 1, 1958. Clearly, N.R.S. 602.070 precludes recovery thereon. The conspiracy claim is also precluded. That claim arose or grew out of the business carried on by appellee under a fictitious name and particularly out of the extension contract of March 6, 1959. Under Nevada law, because of the clear language of N.R.S. 602.070, appellee's conspiracy claim is also barred.

The Court below ruled prior to trial that Chapter 602 did not apply because there was only an isolated transaction. As shown above, the transactions were not isolated ones and in any event suit upon even a single contract is barred. Cannot the present situation be analogized to that of a contractor who comes to Nevada to do a construction job? He hires some construction personnel in Nevada. He hires an accountant to handle all the company's financial records, including payroll. He hires a lawyer. He has an agent who seeks additional work in Nevada. Before his first construction contract expires, he enters into another. His accountant negotiates with state and federal authorities with respect to taxes payable by the contractor and his employees. He claims damages for loss of other Nevada contracting jobs. Could there be any question but that such a contractor transacts business within the meaning of Chapter 602? There is no real difference between that situation and the facts here present, except that the one here present is stronger for the reason that appellee had no business elsewhere. Whatever business there was in Paris belonged to corporate entities. Now, appellee claims rights as an individual proprietor. And if the facts

here do not, as a matter of law, preclude suit, it is submitted that a fact question was presented as to whether appellee was transacting business within Chapter 602, which question should have been submitted to the jury.

B. Appellee Is Estopped to Deny That La Nouvelle Eve Corporation Is a Corporation.

Courts have frequently ruled that if a person holds himself out as doing business as a corporation he is estopped to deny that such a corporation exists. The Supreme Court, in holding that the rule is premised on fairness and justice to the parties involved said:

> "To hold otherwise would be contrary to the plainest principles of reason and of good faith, and involve a mockery of justice. Parties must take the consequences of the position they assume. They are estopped to deny the reality of the state of things which they have made appear to exist, and upon which others have been led to rely. Sound ethics require that the apparent, in its effects and consequences, should be as if it were real, and the law properly so regards it." *Casey v. Galli,* 94 U.S. 673, 680 (1877).

In *Close v. Glenwood Cemetery,* 107 U.S. 466 (1883), the Supreme Court held that an owner of land, who conducted business as a corporation and held the corporation out as the owner of land, was estopped to deny the existence of the corporation.

The California Supreme Court, in *Charles Ehrlich & Co. v. J. Ellis Slater Co.*, 192 Pac. 526, 527 (Cal. 1920), held that a business had "allowed itself to be held out as a corporation, and this is sufficient to estop it to deny the legality of its organization."

In *Alco Finance Co. v. Moran,* 63 P. 2d 747 (Okla. 1936), it was held that by choosing a corporate name under which to transact its business, the purported corporation was estopped to deny its existence.

In *Tidd v. La Salle Industrial Finance Corporation,* 61 N.E. 2d 774 (Ill. 1945), the Court held that signers of a chattel mortgage who held themselves out as a corporation were estopped to deny corporate existence.

In *Mauritz v. Schwind,* 101 S.W. 2d 1085, 1092 (Tex. 1937), the court held that when an extension agreement, extending the time of payment of a note secured by a trust deed, was made in the name of a corporation, acting through a person as its president, the

> " '. . . promoters, stockholders or members, and directors or other officers or agents of a corporation, who have participated either in its organization or in holding it out as a legally existing corporation will be individually estopped to deny its corporate existence as against . . . third persons who deal with it as a corporation. . . .' "

In *Taylor v. Aldridge,* 178 So. 331, 333 (Miss. 1938), the court held that a private person who conducts her business under a corporate name, and clothes herself with such indicia of corporate existence as possessing and using stationery bearing the corporate name and a bank account standing in the corporate name is estopped to deny the existence of the ostensible corporation "in the interest of plain justice" because:

> ". . . as between themselves, and so far as concerns their own private litigation and contestations, they [private persons] may by their agreements, their admissions, their representations, or their conduct estop themselves from denying the fact of

> the existence of the corporation, so that for the purpose of such private litigations the business claiming to be a corporation, and a foreign corporation, may become such to all intents and purposes as much as though it were an actual corporation de jure."

In *Benton-Bauxite Housing Co-Op v. Benton Plumbing,* 310 S.W. 2d 483 (Ark. 1958), it was held that when a person signs a contract as president of a non-existent corporation, and accepts the benefit of such contract, he has held out the existence of such corporation and is consequently estopped to deny its existence.

In *Cavaness v. General Corporation,* 272 S.W. 2d 595, 599 (Tex. 1954) *aff'd on other grounds,* 283 S.W. 2d 33 (Tex. 1955), the Texas court had before it the precise question presented in the present action, the court holding that merely by entering into a contract in the name of a proposed but non-existent corporation, by signing the contract as a representative of such purported corporation, a person is estopped to deny the existence of such corporation, and may not, in his own name and for his sole individual benefit, maintain a suit and recover on the contract made with the defendant:

> "In our opinion he cannot now claim the benefit of the contract personally since he, Cavaness, by signing the contract as President of the D-A-M Company, a corporation, is estopped and barred from denying the existence of the corporation."

Consequently, the court held:

> ". . . that appellant cannot recover in this proceeding for the reason . . . he, Cavaness, is estopped from personally denying in this suit the existence of the D-A-M Company as a legal corpora-

tion and from bringing this suit personally in his own name and for his own individual benefit." (at p. 599).

The instant case is much stronger than any of the preceding cases. There can be no question but that appellee intended to contract in the name of La Nouvelle Eve Corporation. All contracts involved are executed for that entity. It was no accident that they were executed by such apparent entity. Appellee testified he intended to form such a corporation because of tax considerations. The corporate name appears above the signature "P.P. R. Bardy" on the prior drafts of the December 1, 1958 contract as well as the December 1st agreement. The March 6, 1959 contract is in the name of La Nouvelle Eve Corporation.

Appellee had stationery printed for the corporation which showed the principal office of the corporation as an address in Monaco. He entered into an agreement with Madame Deryckere using such stationery which had a government seal thereon for the purpose of giving validity to the document [Ex. 93]. He signed that agreement "Pour la Nouvelle Eve Corporation P.O. R. Bardy" [Ex. 93], indicating he was signing as an agent of the corporation. The agreement shows beyond peradventure that appellee intended that La Nouvelle Eve Corporation was the contracting party in the December 1, 1958 agreement.

Henchis testified that all the contracts appellee had with girls in the show were in the name of a Monte Carlo corporation [T. 2073, lines 11-25]. Appellee produced no contracts of any kind with his performers and it is a fair inference that they were with La Nouvelle Eve Corporation and on the same stationery as that of Madame Deryckere.

Appellee signed the collective bargaining agreement between AGVA and La Nouvelle Eve Corporation on January 15, 1959, "Pour La Nouvelle Eve Corporation P.O. R. Bardy" [Ex. 105].

He told Conner to open the bank account in the name of the Corporation and gave him the rubber corporate stamp which he had brought from Paris to use until checks could be printed with the corporate name. Appellee was a signatory on the corporate account and signed hundreds of checks which at first used the stamp and which were later printed.

The only evidence of any kind that appellee may not have wanted to maintain corporate status is a letter by him to Conner after receipt of letter from Conner dated March 2, 1959, in which Conner advised that Internal Revenue Service concurred that members of the show were not subject to income tax if they remained in the United States less than 183 days [Ex. M]. Appellee's undated answer (probably sent before he returned to Paris on March 6th) blamed AGVA for wanting a corporation to be the "Artist" in the contract with the Hotel [Ex. 157, see pp. 11-12, *supra*].

Aside from the fact that such accusation was wholly false, because the use of the corporation was, according to appellee's testimony, for tax purposes, his blaming of AGVA proves conclusively that appellee unequivocally intended to use La Nouvelle Eve Corporation as the contracting party. However, the rest of the letter left to Conner the decision as to whether or not to continue using La Nouvelle Eve Corporation [Ex. 157, see pp. 11-12, *supra*].

While such a letter to an accountant could hardly affect the facts as they existed prior to that time, it is significant that the March 6, 1959 contract, which

was signed by appellee the day he left for Paris, and after the reply to Conner, was in the corporate name and before he left he had Holmes' name put on the corporate account [T. 1547, line 23, to T. 1548, line 5].

And on April 24, 1959, he wrote AGVA attempting to get money deposited with it for transportation. The copy of the letter in evidence has as its closing "La Nouvelle Eve Corporation" [Ex. N].

Thereafter, appellee, on October 2, 1959, wrote Internal Revenue with respect to the corporation's activities at the Hotel [Ex. 378].

At all times, Conner kept the books and records in the corporate name [Exs. 513, 515, 516, 517, 522, 523, 524]. He negotiated with governmental agencies and filed tax returns in the corporate name [Ex. 378]. All checks paid to performers were corporate checks as were their witholding statements [Exs. 529, 530, 515].

All records maintained by MCA and AGVA were in the corporate name [Exs. 129, 518].

The receipt from Icelandic Airlines for the $12,000.00 deposit advanced by the Hotel was in the corporate name [Ex. Q].

All checks paid by the Hotel were payable to the corporation [Ex. 516].

There exists no evidence that any transactions with respect to the show were carried on in any way except as La Nouvelle Eve Corporation. Under the above authorities appellee must be held estopped to deny that La Nouvelle Eve Corporation is a corporation.

There is another and important side to the estoppel doctrine. It also applies to parties who deal with the purported corporation. In other words a party who contracts with a purported corporation is estopped to deny that the corporation exists. That rule was expressed by

this Court in *Northwest Auto Co. v. Harmon,* 250 Fed. 832, 837 (9th Cir. 1918), as follows:

> "The parties having contracted and dealt with each other as corporations, each is estopped to deny the corporate capacity of the other."[7]

Fletcher, in Cyclopedia of the Law of Private Corporations, §3982, states the rule as follows:

> "By the weight of authority, the rule that one who has contracted with an association as a corporation is estopped to deny its corporate existence applies so as to prevent him from maintaining an action on the contract against the associates, or against the officers making the contract, as individuals or partners. Having contracted with the association as a corporate body, he must sue the associates, if at all, as a corporation. . . ."

The effect of this is that if there was a suit arising out of the agreements in favor of the Hotel, it would have to be against La Nouvelle Eve Corporation and if appellee was sued individually, his defense would be that the Hotel is estopped to deny the corporate existence of La Nouvelle Eve Corporation and such defense would be valid.

If the defense of estoppel is not available in this suit, it means that appellee, by his actions, placed himself in the position whereby any breach on his part would have the Hotel without remedy because La Nouvelle Eve Corporation had no assets.

It is submitted that because of all the circumstances here present this Court should here invoke the estoppel doctrine, or at least hold that a fact question for jury submission existed. Any other holding would approve and invite fraudulent dealing.

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[7] *A fortiori,* any individual in either corporation must be estopped to deny the existence of that corporation.

II.

Appellee was Not the Proper Party in Interest.

A. The Contracts Were Unambiguous With Respect to Who the Contracting Parties Were.

Appellants moved for a directed verdict on the ground that appellee was not the proper party in interest and that indispensable parties were not joined, which motions were denied [T. 2738, line 24, to T. 2739, line 16]

The December 1, 1958 and March 6, 1959 contracts are absolutely unambiguous with respect to the contracting parties, La Nouvelle Eve Corporation and appellant El Ranco Hotel Operating Co. The contracts provide that they are the contracting parties and they executed the contracts. Under the Pre-Trial Conference Order the Court was supposed to rule if they were unambiguous, but did not do so [R. 1845, lines 4-11]. Clearly, appellee had no standing to sue on the basis of either contract. Manifestly appellee was not the proper party in interest as he was not a contracting party. *Cf., Northwest Auto Co. v. Harmon,* 250 Fed. 832, 836 (9th Cir. 1918). Not only can evidence not be admitted to go behind such contracts (*Mencher v. Weiss,* 114 N.E. 2d 177 (N.Y. 1953); *Birchcrest Building Company v. Plaskove,* 120 N.W. 2d 819 (Mich. 1963), but there was no such evidence. What evidence there may be in the record proves conclusively that appellee intended that La Nouvelle Eve Corporation be the contracting party, *i.e.,* the language of the contract between the corporation and Deryckere [Ex. 93]. Accordingly, appellants' motion for a directed verdict should have been granted.

B. The Court Erred in Refusing to Instruct That There Was No Evidence That the Appellee Owned the Night-club in Paris.

In the Court's instructions on the conspiracy claim, the jury was instructed that it could consider the claimed deprivation of appellee of performers in a show at appellee's night club in Paris [T. 3092, lines 5-12]. Appellants objected to the instruction and requested the Court to instruct that there was no evidence that the appellee had any night club. The Court refused to do so [T. 3215, line 25, to T. 3217, line 25]. This was prejudicial error.

As has been shown, the night club was owned by Mansart and always operated by a society tenant. Appellee testified he received income only in the form of author's royalties paid through dummies [T. 1434, lines 7-15; T. 1439, line 24, to T. 1440, line 13]. There was no evidence of any kind that appellee himself owned the club.

Laymen do not understand that corporations are separate persons and that even one hundred per cent stock ownership does not make the stockholder the owner. Accordingly, the instruction that the jury could consider the inability of appellee to reopen his night club and the refusal to instruct that appellee did not own the night club was prejudicial error.

III.

The Admission Into Evidence of Assignments to Appellee Executed After Commencement of the Action Was Prejudicial Error.

The Court admitted in evidence assignments to appellee from Miel, the liquidator of Escarpolette [Ex. 426], from Societe Cythere [Exs. 438, 439], the society which operated the night club after it was reopened in 1959 and which operated it at the time of trial [T.

1523, line 12, to T. 1524, line 5], from Francois and Guiol [Ex. 415] to whom the Escarpolette stock had been issued, and from Deryckere [Ex. 419], appellee's former wife, who claimed an interest in the show and that she was the author. Those assignments purportedly assigned to appellee all rights in Nouvelle Eve Corporation, La Nouvelle Eve, Paris, La Nouvelle Eve Show, L'Escarpolette and the name La Nouvelle Eve. They also purportedly assigned to appellee all rights to the claims against appellants. *All of the assignments were dated after the action was commenced.* Objection to their admission was made [T. 1646, lines 2-9].

Their admission was error for the following reasons:

1. An assignment made during the pendency of an action does not relate back to the time of commencement of the suit and an assignee under such an assignment cannot recover in such action. *Thelin v. Intermountain Lumber,* 80 Nev. 285; 392 P. 2d 626, 628 (1964). Such an assignment requires that the action be dismissed with prejudice. *Las Vegas Network, Inc. v. Shawcross and Associates,* 80 Nev. 405, 395 P. 2d 520 (1964).

2. A cause of action for fraud or similar tort cannot be assigned. *Prosky v. Clark,* 32 Nev. 441, 109 Pac. 793 (1910).

3. An assignment with respect to trade name infringement is invalid unless the good will of the business is also assigned. *George W. Luft v. Zande Cosmetic Co.,* 142 F. 2d 536 (2nd Cir. 1944).

The greatest vice of the admission of the assignments is that there is no way of knowing what effect the jury gave to the assignments, or any one of them.

For example, the jury might have believed that the cause of action for conspiracy belonged to Cythere, the society that was running the night club at the time

of trial, and because of the assignment awarded damages to appellee as the assignee. The jury may have believed that as Cythere was running the night club and using the name La Nouvelle Eve in conjunction therewith, it was entitled to damages for trade name infringement and upon the basis of the assignment, awarded damages to appellee. The jury may have believed that all claims belonged to La Nouvelle Eve Corporation, and not appellee, and because all of the assignments assigned all rights in that corporation to appellee, awarded damages to him as assignee. The jury may have believed that Madame Deryckere had author's or other rights with respect to the show and because of the assignment from her, awarded damages with respect thereto to appellee. The jury may have believed that Escarpolette had a claim because it had put on the Shocking show in 1958 which came to Las Vegas especially as it had sued MCA in Paris in 1959, and as a result of Miel's assignment awarded damages to appellee.

One can theorize endlessly over what possible effect any of the assignments had on the jury. While there is no precise way to determine whether any assignment was considered by the jury in arriving at its verdicts in whole or in part, the fact remains that they were offered in evidence by appellee for the very purpose of having the jury do what we are now theorizing the jury may have done.

The appellee offered the assignments because of his own machinations. Fearful that such actions could result in the jury finding he was not the real party in interest or that indispensable parties were not joined,[8]

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[8]Both issues existed under the Pre-Trial Conference Order [R. 1828, lines 30-32; R. 1829, lines 5-6; R. 1833, lines 24-26; R. 1834, lines 7-9].

he had the assignments prepared and executed during the pendency of this action and offered them at the trial. As demonstrated above they were clearly not admissible. It is submitted that appellee cannot now deny or belittle the consequences of admission of the assignments. Their admission requires reversal of the verdicts herein.

IV.

Appellee Could Not Bring This Action Because He Had Not Arbitrated.

Under the December 1, 1958 contract and the March 6, 1959 extension, La Nouvelle Eve Corporation was designated as the "Artist" [Ex. D, 472]. Paragraph 3 of the December 1 contract makes it a condition thereof that the "Artist" be a member of AGVA and that the Artist's obligations under the contract are subject to AGVA's Rules and Regulations, Constitution and By-Laws. The By-Laws require all members

> "To refer all grievances for arbitration in accordance with the rules of AGVA and to abide by the decision of the arbitrators who are properly designated to arbitrate such grievances and not to sue in any court until and unless all remedies within AGVA are exhausted." [Gregory's Ex. A].

When Mazzei arrived in Las Vegas he stated that it was AGVA's position that the dispute could only be settled in arbitration [T. 2252, lines 9-12]. At the Pre-Trial Conference, the Court below ruled as a matter of law that the arbitration provisions did not apply [Rep. Tr. of Pre-Trial Conference, 299, line 19, to 220 line 16].

Whether appellee's causes of action are based on common law theories governed by Nevada law or on

some federal cause of action under the Lanham Act, he was bound by the agreement to arbitrate. (*Cf. N.R.S.* §38.010 *et seq.* and 9 U.S.C.A. §1 *et seq.; Robert Lawrence Co. v. Dovenshire Fabrics, Inc.,* 271 F. 2d 402 (2d Cir. 1959); *Ambassador G.M. v. Mollart,* 58 Nev. 329, 65 P. 2d 676 (1938); *United Assn. of Journeymen v. Stine,* 76 Nev. 189, 351 P. 2d 965 (1960)). Under both federal and Nevada law, a contract between two parties to submit all disputes to arbitration is valid and enforceable. (*Robert Lawrence Co. v. Dovenshire Fabrics, Inc., supra; United Assn. of Journeymen v. Stine, supra*).

An agreement to arbitrate disputes may include tort as well as contract disputes. (*Robert Lawrence Co. v. Dovenshire Fabrics, Inc., supra (*fraud); *Saucy Susan Products, Inc. v. Allied Oil English, Inc.,* 200 F. Supp. 724 (S.D.N.Y. 1961) (trademark infringement); *Almacenes Fernandez, S.A. v. Golodetz,* 148 F. 2d 625 (2d Cir. 1945) (conspiracy). The courts have expressed a liberal policy favoring arbitration. In the *Saucy Susan Products* case, *supra,* the court dealt with issues very similar to those existing in the present case, particularly trademark infringement and unfair competition under the Lanham Act, and held those issues subject to arbitration under

> " 'the federal policy to construe liberally arbitration clauses, to find that they cover disputes reasonably contemplated by this language, and to resolve doubts in favor of arbitration.' " (200 F. Supp. 724, 727),

quoting with approval *Metro Industrial Painting Corp. v. Terminal Const. Co.,* 287 F. 2d 382 (2d Cir., *Cert. den.* 368 U.S. 817 (1961)).

Since the court properly ruled that there had been no waiver of the arbitration requirement [Rep. Tr. Pre-

Trial Proceeding 300, lines 15-16] and since the pertinent arbitration provisions of AGVA are at least as broad as those dealt with under the cases discussed above, the court erred as a matter of law in not staying the action as requested by appellants and submitting the issues to arbitration.

V.

The Court Erred in Refusing to Instruct That Evidence of the Alleged Conspiracy Had to Be Clear and Convincing.

The Court refused appellant's request to charge the jury that evidence of the conspiracy had to be at least "clear and convincing" [T. 2753, line 6, to T. 2754, line 8; T. 2807, line 16, to T. 2811, line 11] and instead, instructed that the quantum of proof required was only a clear preponderance [T. 3087, lines 1-3].[9] The Court's refusal was prejudicial error.

The vast majority of American courts, who have considered the question, are in agreement that proof of a civil conspiracy must be shown, *at least,* by clear and convincing evidence. A survey of recent cases reveals the near universality of the requirement that proof of conspiracy, regardless how the standard be labeled, must be by more than a preponderance.

In Illinois, the courts demand that proof of a civil conspiracy be "clear and convincing". *Bergeson v. Mullinix,* 78 N.E. 2d 297 (Ill. 1948). *National Steel & Cooper Pl. Co. v. Angel Research, Inc.,* 188 N.E. 2d 500 (Ill. 1963). Both the Oklahoma, *Holland v. Perrault Brothers, Inc.,* 311 P. 2d 795 (Okla. 1957), and Missouri, *Fitzpatrick v. Federer Realty Company,* 351

[9]No instruction was given as to the meaning of "clear preponderance".

S.W. 2d 673 (Mo. 1961), standards are likewise "clear and convincing".

The degree of proof in Michigan is "clear and satisfactory". *Harvey v. Lewis,* 98 N.W. 2d 599 (Mich. 1959), *rev'd on other grounds,* 114 N.W. 2d 214 (Mich. 1962).

The Wisconsin courts apply both the "clear and convincing" standard, *Roberts v. Saukville Canning Co.,* 26 N.W. 2d 145 (Wis. 1947), and a standard of proof "by clear and satisfactory evidence", or "by the clear and satisfactory evidence to a reasonable certainty", or "by clear, satisfactory and convincing evidence". *Cox v. Cox,* 48 N.W. 2d 508, 510 (Wis. 1951).

A higher degree of proof of a civil conspiracy is demanded in California, which requires that such evidence be "full, clear, and satisfactory." *Stevenson v. Stevenson,* 97 P. 2d 982 (Cal. 1940).

The "full, clear and satisfactory" standard likewise prevails in Texas, *Elick v. Schiller,* 235 S.W. 2d 494 (Tex. 1950), *rev'd on other grounds,* 240 S.W. 2d 997 (Tex. 1951); *Gager v. Reeves,* 235 S.W. 2d 688 (Tex. 1951), and in Pennsylvania, *Blank & Gottschall Co. v. First Nat. Bank,* 50 A. 2d 218 (Pa. 1947); *Fife v. Great Atlantic & Pacific Tea Co.,* 52 A. 2d 24 (Pa. 1947), and *Burkholder v. Westmoreland County Institution Dist.,* 68 A. 2d 436 (Pa. 1949).

A yet higher standard of proof appears to be demanded in Washington. Although the Washington courts once adhered to the "clear and convincing" standard, *Harrington v. Richeson,* 245 P. 2d 191 (Wash. 1952), more recent cases, state and federal, have required evidence of conspiracy to be "clear, cogent, and convincing". *Cheesman v. Sathre,* 273 P. 2d 500 (Wash. 1954), *Lewis Pacific Dairymen's Associa-*

tion v. Turner, 314 P. 2d 625 (Wash. 1957), *Robinson v. Stevens,* 249 F. 2d 731 (9th Cir. 1957), *Asheim v. Pigeon Hole Parking, Inc.,* 283 F. 2d 288 (9th Cir. 1960).

In the federal courts, proof of a civil conspiracy, in violation of the Sherman Anti-Trust Act, must be by the minimal standard — "clear and convincing". *United States v. Univis Lens Co.,* 88 F. Supp. 809 (S.D.N.Y. 1950).

Thus, regardless of the label used, the various American jurisdictions appear to be in complete agreement with the Washington court that the standards of proof of a civil conspiracy "unquestionably . . . mean something more than a preponderance of the evidence." *Cheesman v. Sathre,* 273 P. 2d 500, 502, *supra.*

The precise question before the Court in the present case was considered by the Washington Supreme Court in the *Cheesman* case. There the trial court instructed the jury that the alleged conspiracy could be proven by a preponderance of the evidence, and refused to instruct the jury that the plaintiff must prove the existence of the conspiracy by the Washington standard, evidence that is "clear, cogent, and convincing". The court held that it was prejudicial error not to give the requested instruction and on that ground granted a new trial.

Accordingly, in the present case, the Court committed prejudicial error by instructing the jury that the evidence of the alleged conspiracy among the various defendants need only be by a clear preponderance, and by refusing to instruct the jury that plaintiff had the burden of proving the existence of the alleged conspiracy by the proper standard of evidence—clear and convincing.

VI.

The Verdict Against El Ranco Hotel Operating Co. for Breach of the December 1, 1958 Contract in the Amount of $27,201.00, Reduced by Remittitur to $24,300.66, Is Not Supported by Any Evidence.

In his amended complaint appellee alleged appellant El Ranco Hotel Operating Co. was indebted to him under the contract of December 1, 1958 in the sum of "approximately $17,237.61" [R. 145, lines 12-15]. The jury's verdict was $27,281.00. A remittitur reduced this to $24,300.66 [R. 2226, 2227].

Aside from other grounds raised herein by appellants, it is manifest that there is no competent evidence to support the verdict on this claim and all evidence on the issue demonstrates that nothing was owed to anyone on the December 1, 1958 contract [Ex. D].

Although the Pre-Trial Conference Order set forth as issues of fact the question of performance under the contract and whether any money was owed to appellee under the contract [R. 1828, lines 16-21] the only oral evidence offered by appellee on the issues is as follows:

> "The Court: Let's not take the time for this. I will ask him the question.
>
> Mr. Bardy, did you do everything that you were called upon to do under your contracts with the El Rancho Vegas Hotel in connection with the La Nouvelle Eve Show?
>
> Mr. Lionel: If the Court please, defendants would respectfully object to the question on the ground that no sufficient foundation has been laid, and on the further ground it calls for a conclusion of the witness.
>
> The Court: You are entitled to object, and I will overrule the objection, in the interest of saving time, and you may cross-examine fully on it.

Did you perform everything you were supposed to perform or called upon to perform under your contracts with the El Rancho Vegas Hotel?

Mr. Lionel: If the Court pleases, I would like to make a further objection, respectfully, that is that there are no contracts between the plaintiff and the El Rancho Vegas Hotel or any corporations.

The Court: Yes, I understand that to be your objection throughout, and that will be overruled.

Mr. Galane: May I ask a question, your Honor?

The Court: Very well.

Mr. Galane: May I, sir, please ask Mr. Bardy?

By Mr. Galane:

Q. Mr. Bardy, did you perform all contracts between you and the El Rancho Vegas Hotel?

The Interpreter: Could I have the question repeated, please?

By Mr. Galane:

Q. Mr. Bardy, did you perform all contracts between you and the El Rancho Vegas Hotel?

Mr. Lionel: Before the witness answers, may the record show the same objection?

The Court: Yes. The objection will be deemed made, and the record will show clearly that you object, all of you, all defendants—

The Witness: Yes.

The Court: —to these questions as to performance.

Mr. Galane: Would the record now show the answer of the interpreter as to what Mr. Bardy stated in response to my question?

The Witness: Yes.

By Mr. Galane:

Q. Were you paid in full under the contract dated December 1, 1958?

Mr. Lionel: To which the defendants will object on the same grounds as indicated before and, particularly no foundation.

The Court: Very well.

Mr. Galane: Shall I repeat the question in view of counsel's objection?

The Court: The objection will be overruled. As to these questions as to performance, unless you want to repeat it, the record may be deemed to show that you made the same objection.

Mr. Lionel: Yes, your Honor.

The Court: And the same ruling upon all this line of questions as to performance and payment.

Mr. Galane: In view of the colloquy, may I repeat the question, your Honor?

The Court: Yes.

By Mr. Galane:

Q. Were you paid in full under the contract dated December 1, 1958, between you and El Rancho Vegas? A. He hasn't been paid completely.

Q. How much is owed you under the contract of December 1, 1958, between you and El Rancho Vegas?

Mr. Lionel: If the Court please, I must enter another objection, and this goes to the whole line of questioning; that is, it assumes facts not in evidence; namely, that Plaintiff's Exhibit 90 and 90A are contracts dated December 1, 1958.[10]

The Court: Very well. That objection may be added, and it is overruled.

Mr. Galane: May I repeat the question?

The Court: Did the witness say he had been paid in full?

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[10]Exs. 90 and 90A were dated November 25, 1958. Only Ex. D is dated December 1, 1958, and was not admitted in evidence until later in the trial.

Mr. Galane: No, sir.

(Record read.)

The Court: Has not; is that it?

The Interpeter: That is correct.

The Court: Would the Reporter note the answer just given by the Reporter? The Reporter takes down everything that is said in the courtroom. I tell every reporter to take down everything that is said in the courtroom during the session of the court, and even if I say 'Don't take it down,' just take that down, too. That is his official duty.

By Mr. Galane:

Q. Mr. Bardy, how much is owed you? A. About $18,600.

The Court: Is that the contract of December 1, 1958?

Mr. Galane: That is correct, sir.

The Court: Is that what he understood?

By Mr. Galane:

Q. Did you understand by your last answer that you were referring to the December 1, 1958, contract? A. Yes, the first contract.

The Court: And the figure given was what?

(Record read.)

The Court: $18,600, which the plaintiff says is unpaid under the first contract.

Mr. Lionel: May I have that full answer read back again, please?

(Record read.)

Mr. Galane: Shall I continue questioning?

The Court: About $18,600.

The Interpreter: About, yes.

The Court: Is it more or less, or can we have the exact figure?

The Witness: It can be more; it can be less.

It can be plus; it can be less. The account must be made at the end of the contract.

By Mr. Galane:

Q. Mr. Bardy, explain what you mean that the account was to be made at the end of the contract. A. The artists were paid by the accountant. It was reimbursed every week, $2,000 advance by Mr. Katleman. It was given to me personally, $5,000 every week. I buy the seamstress some fixings to keep up the dresses. The bills were presented to the accountant, and this is for this reason, and this is when we should have the account to be made at the end of the contract.

Q. When did you leave Las Vegas for Paris? A. 6th of March, 1959.

Q. Before you left Las Vegas for Paris, were you ever presented with any bill by El Rancho Vegas Hotel? A. Never." [T. 1267, line 4, to T. 1272, line 13].

Surely this testimony was not admissible for any purpose. It consisted of inadmissible conclusions (See 32 C.J.S. §453, Evidence, pp. 93, 94) made by a person not qualified in any respect to even testify concerning any of the facts underlying the inadmissible conclusions.

The December 1, 1958 contract covered performance through April 7, 1959, a month after appellee returned to Paris. Payments under the contract were not made to appellee, but to Conner, the accountant for La Nouvelle Eve Corporation [T. 1551, line 22, to T. 1553, line 13]. Conner received the weekly checks from either Peter Holmes or the wardrobe mistress and deposited them in the bank account of La Nouvelle Eve Corporation [T. 1842, lines 8-20].

According to Conner, the cash receipt journal of La Nouvelle Eve Corporation (Exhibit 513L) in which he

posted the weekly checks, the total received through April 7, 1959, was $150,000.00 [T. 1842, line 18, to T. 1843, line 21]. That sum represents the total amount provided for by the December 1, 1958 contract—ten weeks at $15,000.00 per week.

Furthermore, appellee testified on cross-examination that in arriving at the approximately $18,600 figure, he did not give credit for the $10,000.00 paid by the hotel to AGVA for the return transportation of the troupe which was an obligation of the artist under the contract [T. 1562, lines 11-22]. And although the Court commented on this fact several times and appellee's counsel represented on several occasions that he would show appellee also paid some portion of the return transportation, he never did do so [T. 2139, line 6, to T. 2440, line 25; T. 2451, line 1, to T. 2452, line 10]. On one occasion, with respect to the credit for the return transportation, the Court said:

> "Can't we find out exactly? You aren't going to ask this jury to render a verdict for approximately so much money. I can't render a judgment for approximately so much money; have to be a definite amount."[11] [T. 2453, lines 10-13].

The foregoing demonstrates that there is no competent evidence to support a verdict for alleged breach of the December 1, 1958 contract. In Nevada, "to justify a money judgment the amount as well as the fact of damage, must be proved . . . there must be substantial evidence as to the amount of damage, as the law does not permit arriving at such amount by conjecture . . ." *Alper v. Stillings,* 80 Nev. 84, 389

[11]The jury could well have inferred from the foregoing statement of the Court that the Court felt appellee was entitled to a verdict and the only question involved was the amount thereof. In this regard, see page 78 *infra,* where appellants requested a mistrial on the ground that by the remarks of the Court the burden of proof had shifted to the appellants.

P. 2d 239, 240 (1964). *Peterson v. Wiesner,* 62 Nev. 184, 206, 146 P. 2d 789 (1956).

Testimony from a party, who did not receive the weekly checks, who did not take care of the books of account, who was not even in the United States during a portion of the period involved, that he was owed "about $18,600," but that "it can be more; it can be less. It can be plus; it can be less," cannot by itself support a verdict, particularly when the books of account show that all sums provided for by the contract were received. As far as performance is concerned, no evidence other than appellee's conclusion is in the record.

How the jury arrived at a verdict of $27,281.00 is a mystery. The difference between "about $18,600" and that amount can hardly be attributed to an error in computation of interest. Rather, it is indicative of the influence of passion and prejudice against appellants. Regardless of amount, there exists no basis whatsoever for a judgment against appellant Hotel El Ranco Operating Co. for breach of the December 1, 1958 contract.

VII.

The Conspiracy Verdict Is Not Supported by Any Evidence.

A. Under Nevada Law There Can Be No Recovery of Damages Without Proof of Damages and Speculation or Conjecture Will Not Support an Award of Damages.

It is indeed difficult to understand how the jury arrived at its huge conspiracy verdict. No valid evidence exists to support it. At the outset it should be pointed out that appellee *never* introduced any evidence to show what he ever earned. Whether such failure was due to his manipulations for tax purposes or otherwise is unknown, but nevertheless there was no such evi-

dence. This fact prompted the Court below to remark as follows:

> ". . . the plaintiff never offered any evidence as to what he made in the club over there, and he never offered any evidence as to whether he had any profit in his run here or not." [T. 2862, lines 17-20].

Under Nevada law it is crystal clear that under such circumstances there can be no recovery.

In *Alper v. Stillings,* 80 Nev. 84, 86, 389 P. 2d 239, 240 (1964), the Nevada Supreme Court reversed a $10,000.00 jury verdict awarded to the owners of a bar who had sued their landlord for a breach of his covenant of quiet enjoyment. In reversing, because of the failure of proof of damages, the Court said:

> "It is established law in this state, as in most jurisdictions, that to justify a money judgment the amount, as well as the fact of damage, must be proved; that there must be substantial evidence as to the amount of damage, as the law does not permit arriving at such amount by conjecture; that to prove a right to damages without proving the amount, entitles a plaintiff to nominal damages only. *Peterson v. Wiesner,* 62 Nev. 184, 206, 146 P. 2d 789."

In another recent Nevada case, *Knier v. Azores Construction Co.,* 78 Nev. 20, 23, 368 P. 2d 673, 675 (1962), a motel sought damages from a contractor based on delay in moving and rehabilitating a motel. In reversing an award of damages because there had been no established business having a history of profit for such a length of time as to make the loss of profit reasonably ascertainable, the Court said:

> "The Stage Coach Motel at its new location was a new business venture. Admittedly, it had been operative one-half mile away from 1953 to the fall

of 1955 when it closed. The record before us is silent as to why it closed. Nor does it reveal whether the motel at its original location ever enjoyed a profit. Hence, the fact that it had been an operating motel two years before at a nearby location, under the circumstances of this case, is of no assistance to Azores and Brunzell in their attempt to establish a claim for loss of profits.

"In Dieffenbach v. McIntyre, 208 Okl. 163, 166, 254 P.2d 346, 349, it was said 'While it is true that we have in numerous cases held that the loss of profits in an established business is a proper element of damages, the business of plaintiff in her former uptown location could not be used, we think, to measure the damages sustained by her, because of her removal from the buildings of defendant. She occupied the buildings of defendant only two months, and that in our opinion was not a sufficient length of time to constitute her business there an established business.' Where the loss of anticipated profits is claimed as an element of damages, the business claimed to have been interrupted must be an established one and it must be shown that it has been successfully conducted for such a length of time and has such a trade established that the profits therefrom are reasonably ascertainable. See anno. 1 A.L.R. 156; 99 A.L.R. 938.

"The rule against the recovery of uncertain damages generally is directed against uncertainty as to the existence or cause of damage rather than as to measure or extent. Brown v. Lindsay, 68 Nev. 196, 205, 228 P.2d 262, 266. We hold that the claimed existence of damage, that is, the loss of prospective profits, of The Stage Coach Motel, a new business enterprise, is too uncertain and speculative to form a basis for recovery."

Those Nevada decisions apply flatly to the case at bar, because there exists no proof of properly ascertainable damages and the verdict must of necessity have resulted from pure speculation or conjecture.

B. Because Appellee Could Have no More Than a Naked Claim for Unfair Competition, the Court Erred in Instructing the Jury on the Issue of Damages With Respect to Trade Name Infringement Under the Lanham Act.

Appellant moved for a directed verdict with respect to appellee's claim under the Lanham Act on the ground that a naked claim of unfair competition did not come under the Lanham Act[12] [T. 2737, lines 13-22]. The motion was denied [T. 2738, line 2] and the jury was instructed that on the conspiracy issue it could consider damages suffered by reason of injury to the reputation of the trade name La Nouvelle Eve by reason of the La Nue Eve show at the Hotel from July 29, 1959 to October 21, 1959, and by reason of confusion as to the source of production in violation of appellee's rights as owner of such trade name [T. 3095, line 17, to T. 3097, line 7].

The denial of the motion and the instruction were error because the Lanham Act afforded no protection to the name "La Nouvelle Eve" because it was neither a trade name nor a registered trade mark. In *Shaffer v. Coty, Inc.*, 183 F. Supp. 662, 664 (S.D. Cal. 1960), it was held that the Lanham Act did not provide a federal remedy for acts of unfair competition which did not involve the infringement of a federally registered trade mark or an unregistered trade name and that such a claim was merely a "naked" claim for unfair competition.

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[12]Appellee elected to proceed under the Lanham Act and not under the common law of unfair competition [Tr. 2794, lines 2-15].

> ". . . that Act does not confer upon the Federal courts jurisdiction over 'naked' claims for unfair competition, or over claims for infringement of unregistered marks."

It is clear that a trade mark identifies a product or a vendable commodity while a trade name identifies and distinguishes a business and its good will. *In re Lyndale Farms* (C.C.P.A. 1951), 186 F. 2d 723; *American Steel Foundries v. Robertson,* 269 U.S. 372 (1926); *Standard Oil Company v. Standard Oil Company,* 252 F. 2d 65 (10th Cir. 1958). "La Nouvelle Eve" does not identify any product or vendible commodity. Thus, the question presented is whether it is a trade name and identifies a business and its good will. If it does not, it is not protected by the Act.

Appellee testified that "La Nouvelle Eve" is a title which was first used in 1950 [T. 1058, lines 19-23] and that since then the title was used on a neon sign on the building where the night club was located in Paris. It was lit up every night except when the club was closed [T. 1061, lines 8-20; T. 1062, line 24, to T. 1063, line 7]. Appellee testified there never was any show called La Nouvelle Eve [T. 1094, lines 1-4]. Thus, based on appellee's own testimony "La Nouvelle Eve" did not identify any business. Actually it was only the name of a night club in Paris. A night club owned by Mansart and leased, and in some cases in turn subleased, to societies which operated the night club. It is undisputed that it identifies no business and the good will of such business. No society who ran the business prior to 1959 had any good will either, because each of them failed as businesses. Under such circumstances, it was not protected by the Lanham Act and the denial of the motion and the damage instruction given was therefore prejudicial error.

C. The Misconduct of Appellee's Counsel in Apprising the Jury of the Tax Consequences of a Verdict in Favor of Appellee, Was a Cause of the Monstrous Verdict.

At various times during the trial, the Court admonished appellee's counsel not to make speeches, but just to state his objections (See Appendix A). Nevertheless, during summation of counsel for appellants MCA and Gerber the following occurred:

> "Mr. Foley: . . . There has been enough colloquy between counsel during the case. You have heard enough of that. But bear in mind these people talk about the Bible and then talk about big money. They want to penalize us. They want this Nevada jury to give Bardy money that won't even be taxed in the United States to take back to France to show the world that we are not putting up—
>
> "Mr. Galane: If your Honor please, I move that be stricken, and ask the Court to instruct the jury everything recovered by Mr. Bardy is taxable in full by the United States Government upon that source of income. It was an improper statement, and I ask it be clarified. Everything is taxable as ordinary income, even the punitive damages, under the rulings of the United States Courts, and that is my advice to Rene Bardy, as his American counsel, at the full taxable rate of income."

The foregoing obviously deliberate statement of appellee's counsel was prejudicial. Not only was it made in violation of the prior admonitions of the Court, but there was no possible way to have removed its prejudicial effect from the minds of the jurors. It is well settled that it is improper for counsel to apprise a jury of the tax consequences of an award. *Pfister v. City of Cleveland,* 113 N.E. 2d 366 (Ohio, 1953); *Wagner v. Illinois Central Railroad,* 129 N.E. 2d 771 (Ill. 1955);

Highshew v. Kushto, 134 N.E. 2d 555 (Ind. 1956); *Bracy v. Great Northern Railway Company,* 343 P. 2d 848 (Mont. 1959). The purpose of the remarks of appellee's counsel is all too obvious. The jurors could well have felt that even if appellee himself was not entitled to a large award, most of the money would go to the government. Or, the jurors could have felt that because the award was taxable they should increase it so that appellee would net sufficient money after taxes to compensate him for any damages they felt he may have sustained. In either event the jury should not have been subjected to the statement of appellee's counsel and particularly at the time it was made.

Even if appellee should argue that MCA's counsel provoked an objection at that point, that does not excuse the "speech." The Hotel's counsel was not involved, but was powerless to do anything about it. The statement must surely have had an effect upon the jury adverse to appellant Hotel.

VIII.

The Hotel and Katleman Are Not Liable for Conspiracy.

Because of space limitations, the argument by co-appellants MCA and Gerber on the conspiracy issue, on both the law and the facts, is adopted by appellants Katleman and the Hotel. However, on one phase thereof argument is here made.

The conspiracy claim, when reduced to its essence, is in reality predicated on what happened on the night of April 8, 1959, and immediately prior thereto. The subsequent events are ingeniously grafted thereon by ap-

pellee's counsel, but as co-appellants' brief demonstrates, there exists no evidence to support the contentions of appellee that they resulted from any conspiracy.

Putting aside for the moment all other defenses raised by appellants, in reality there exists at best a case involving a question of breach of contract only. In other words, did the Hotel breach the March 6, 1959 contract with La Nouvelle Eve Corporation by not permitting the show to perform on April 8, 1959? Even if we assume that the Hotel was in some way privy to Morrison and Caire being in Los Angeles on that night so as to support its position that there was a breach, because the leading performers were not present ready to perform, such acts only would prevent the Hotel from claiming a breach of contract on the ground of their absence and render the Hotel liable for damages for breach of contract. Restatement of the Law of Contracts, Sec. 315. Numerous decisions hold that parties to a contract are not liable for conspiracy to breach the contract. *Eidelberg v. Newman,* 206 N.Y.S. 2d 205 (1960); *Shulman v. Royal Industrial Bank,* 113 N.Y.S. 2d 489 (1952); *Hein v. Chrysler Corp.,* 277 P. 2d 708 (Wash. 1954); *Allison v. American Airlines,* 112 F. Supp. 37 (D. Okla. 1953).

Furthermore, the evidence is overwhelming that Morrison had no contract with Henchis after April 7, 1959, and was returning to London, and Caire had no contract and was not going to perform after April 7th unless she received a contract and a raise. Appellee was fully aware of this situation, but did absolutely nothing to alleviate it. His answer, before leaving for

Paris on March 6th was that it would be taken care of, but it never was [T. 335, lines 16-23]. Under such circumstances appellee is in no position to blame appellants for preventing the appearance of Morrison and Caire, especially as he had promised their performance and, in effect, contracts with them prior to the execution of the March 6, 1959 agreement [Exs. 472, 469].

What happened here was in reality a game of poker played by appellee. He left Las Vegas immediately after making an appointment to discuss the extension with Katleman requiring Katleman to fly from New York to Las Vegas. He knew that the Hotel needed a show in order to do business. Appellee was aware that if he did not sign up Morrison and Caire and did not replace the manikins as he had promised, there existed the possibility that the show would not go on on April 8th. In his letter to Holmes dated March 31st, he wrote with respect to Katleman, ". . . I don't believe in his bluff." [Ex. 217]. Appellee played his cards to the hilt. He felt that the Hotel would either have to permit the show to go on or he would litigate. He was supposed to be in Las Vegas on April 6th. He did not appear, but instead devoted his energies to preparing for litigation, including preparation of false evidence, such as his request to Holmes to obtain a false doctor's certificate that Henriette Charmat was ill [Ex. I]. He refused to speak to Stein in Paris. He refused to telephone Durieux [Ex. 220]. He kept Gerber in the dark. After authorizing a new deal with an abbreviated show, he reneged. In this suit he has won his poker game and a pot far beyond his expectations. It is submitted that a conspiracy connotes a situation completely unlike that here present and appellants Hotel and Katleman were not liable for any conspiracy.

IX.

The Court's Conduct in Permitting Appellee to Testify Without Foundation to Broad Conclusions, the Constant Interruption of the Cross-Examination of the Appellee and the Limitation of Such Cross-Examination and the Court's Impatience With Respect Thereto, the Constant Interruption of Gerber's Direct Testimony and His Cross-Examination During Such Direct Testimony and the Misconduct of Appellee's Counsel Deprived Appellants of a Fair Trial.

In Point VI, *supra,* there is set forth a portion of appellee's direct examination. There the Court permitted appellee to testify to broad conclusions with respect to both performance and payment. As there shown there was no foundation laid for the testimony permitted over objection of appellants' counsel. The reason given for the Court's conduct was that "it was in the interest of time." It is submitted that the reason given does not justify what occurred, particularly in a case in which the jury verdicts exceeded one half million dollars.

On other occasions the Court permitted appellee to testify on direct examination to leading questions on important issues propounded by the Court itself, *i.e.,*

> "The Court: Did you ever give the Hotel or anyone permission to use the name of the show, the costumes, or any of the people in it, or any of the production numbers, or any of the property in connection with the show, after April 8, 1959?
>
> The Witness: Yes.
>
> The Court: Whom did you give permission to?
>
> The Witness: To Mr. Katleman after he had signed the additive to the contract.

The Court: But after the show was prevented from going on stage on April 8, 1959—

Mr. Lionel: May the record show that the defendants respectfully would object to the question by your Honor at this time?

The Court: Yes. State your grounds of your objection.

Mr. Lionel: On the ground that the witness has answered the question; on the further ground that it is leading and suggestive and calling for the conclusion of the witness.

Mr. Galane: I think with a foreign witness, to suggest he has answered the question—

The Court: I didn't ask for any comments. Overruled.

After the show was prevented from going on stage on April 8, 1959, did you give anyone such permission?

The Witness: No." [T. 1312, line 13, to T. 1313, line 11].

Following the Court session at which the above questioning occurred and which was during the same session as the testimony with respect to performance and payment were given (Point VI, *supra*), appellants' counsel moved for a mistrial on the ground that "by permitting the plaintiff himself to testify to broad conclusions of fact and, particularly, broad conclusions placed by the Court, . . . the jury may have a feeling that in the mind of the Court there is no question but what the plaintiff has a case and has proved his case . . . [and] by permitting the plaintiff to testify in this manner, the burden of proof has, in fact, shifted to the defendants to disprove that the plaintiff did not have damages, and certain other things, which are clearly in issue under the pretrial order." [T. 1340, line 14, to T. 1341, line 1]. The motion was denied [T. 1341, line 17].

Appellants' contend that the Motion was well taken and should have been granted.

Appendix "A" hereto contains portions of appellant's cross-examination of appellee. Appellee testified in French and an interpreter was used. Such cross-examination is difficult under normal circumstances. Here by reason of the constant unwarranted interruption of the cross-examination by the Court and appellee's counsel, effective cross-examination of appellee was impossible and resulted in a denial of the right of cross-examination.

In Appendix "A" appellants have set forth their characterization of the action of the Court and appellee's counsel. Appellants submit that the characterizations are correct and that the Court unwarrantedly constantly interrupted the cross-examination, took control of the cross-examination on numerous occasions, belittled counsel for many of the questions asked, charged counsel with being unfair to the witness, in effect advise the jury that appellee had not been discredited and placed the cloak of legality on appellee's peculiar financial and corporate dealings by making it appear that "tax purposes" was justification therefor. The constant pressuring of counsel to complete cross-examination within specific limitations of time and refusing time requested prevented proper cross-examination. The constant request that appellants' counsel stipulate to facts was clearly improper. Surely a party has the right to elicit facts from an adverse party on cross-examination and to have the jury observe the demeanor of the party as well as hear the testimony. The credibility of appellee was one of the most vital matters for jury determination. Counsel has the right to determine what evidence he will elicit from the adverse party on cross-examination and what evidence he will elicit from

his own witnesses. The comments of the Court as to whether Katleman was going to testify and why the Hotel could not itself prove certain things were unjustified and improper. So too were objections voluntarily made by the Court to cross-examination questions.

The actions of appellee's counsel in constantly interrupting the cross-examination to make demands and "speeches" were most harassing and also improper. The constant offers to stipulate were improper and impeded the cross-examination. Except for several occasions where the Court admonished appellee's counsel not to make "speeches" his conduct was condoned by the Court and practically invited. The repetitive remarks about Katleman's signature were not only disruptive, they were deliberate, and unethical. The actions of the Court and counsel resulted in a denial of the right of cross-examination.

Attached as Appendix "B" are portions of the direct examination of appellant Gerber. No characterizations are included. The appendix is included for the purpose of showing the constant interruption by the Court of such direct examination, the frequent cross-examination by the Court during such direct examination and the constant interruption by appellee's counsel particularly with his constant offers to stipulate, which were most disruptive and impeded Gerber's direct examination. The only specific portion to which attention is called is the following:

> "Q. He told you he, a man, was going to sign. 'Oh, My Man I Love You So'?
>
> The Witness: He didn't say that; he said he was going to sing her numbers. That was one of her numbers.
>
> The Court: Do you want the jury to understand he was going to sing 'Oh, My Man, I Love You So'?" [T. 2517, lines 9-14].

The jury could well have inferred that the Court did not believe Gerber.[13]

The continual interrogation by the Court of Gerber during his direct examination was prejudicial, especially in the light of appellee's counsel's remark before the jury at the commencement of Gerber's examination that "I want the record to show—I say this respectfully—credibility is a major issue on Mr. Roy Gerber." [T. 2350, lines 15-17].[14]

The Court recognized that it had unduly pressured counsel to hurry the trial and advised counsel in chambers that he had put pressure on counsel, because there was pressure on him because another judge had to use the courtroom [T. 1895, lines 2-24]. It is submitted that such reason does not justify the pressure exerted on counsel, especially when the case was tried 450 miles away from Las Vegas, on short notice, and where none of the counsel, parties or witnesses resided.

While it is true that reversible error predicated on conduct of a Court of the nature here involved is *sui generis,* language used by appellate courts in reversing judgments because of judicial conduct during trial is useful.

> "No principle is better settled than that a judge presiding at a trial should manifest the most impartial fairness in the conduct of the case. Be-

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[13]Holmes himself testified that he offered to do Caire's part on April 7th including singing her songs [T. 279, lines 3-14].

[14]Remarks by appellee's counsel of such nature were not unusual, *i.e.,* during his cross-examination of Katleman, he said, "May I read this testimony to the jury? It is eight lines and rather crucial, in view of what Mr. Katleman just testified to." [T. 2697, lines 15-17].

cause of his great influence with the jury, he should refrain from impatient remarks or unnecessary comments which may tend to result prejudicially to a litigant or which might tend to influence the minds of the jury. By his words or conduct he may, on the one hand, support the character and weight of the testimony or may destroy it in the estimation of the jury. Because of his personal and official influence, uncalled for or impatient remarks, although not so intended by him, may give one of the parties an unfair advantage over the other." *Western Coal & Mining Co. v. Kranc,* 100 S.W. 2d 676, 677 (Ark. 1937).

". . . we have concluded that plaintiff's were deprived of a fair trial and an unprejudiced consideration of the case by the jury because of Trial Judge's repeated lengthy cross-examination of plaintiffs' witnesses, constant interruptions of answers of witnesses and unnecessary criticisms of plaintiffs' counsel; and because the judge so far injected himself into the proceedings that the jury could not review the case in the calm and untrammeled spirit necessary to effect justice." *Kamen Soap Products Co., Inc. v. Prusanky & Prusanky, Inc.,* 201 N.Y.S. 2d 875, 876 (1960).

". . . The responsibility of striving for an atmosphere of impartiality during the course of a trial rests upon the trial judge. His conduct in trying a case must be fair to both sides, and he should refrain from remarks which might injure either of the parties to the litigation. Since the judge's duties are of a judicial nature, he should not act as counsel for a party by raising objections which the party should make." *Hansen v. St. Paul City Ry. Co.,* 43 N.W. 2d 260, 264 (Minn. 1950).

In *La Chase v. Sanders,* 111 A. 2d 690, 692 (Conn. 1955), the Court quoted from *Commonwealth v. Myma,* 123 Atl. 486, 487 (Pa. 1924) as follows:

> " 'The practice of a judge entering into the trial of a case as an advocate is emphatically disapproved. The judge occupies an exalted and dignified position; he is the one person to whom the jury, with rare exceptions, looks for guidance, and from whom the litigants expect absolute impartiality. An expression indicative of favor or condemnation is quickly reflected in the jury box and at the counsel table. To depart from the clear line of duty through questions, expressions, or conduct, contravenes the orderly administration of justice. It has a tendency to take from one of the parties the right to a fair and impartial trial, as guaranteed under our system of jurisprudence. Judges should refrain from extended examination of witnesses; they should not, during the trial indicate an opinion on the merits, a doubt as to the witnesses' credibility, or do anything to indicate a leaning to one side or the other, without explaining to the jury that all these matters are for them.' "

In *Rooker v. Deering Southwestern Ry. Co.,* 226 S.W. 69, 70 (Mo. 1920), the Court held:

> "It is the duty of the trial court to preside but not to take sides, or by act, conduct, or words to show his feeling in the case, and not to sacrifice the rights of a party for the saving of a little time."

In *Pickerell v. Griffith,* 29 N.W. 2d 588, 595 (Iowa 1947), the Court said with respect to cross-examination:

> "Cross-examination is a most important right to a litigant, and a most effective aid to the jury

> and the court in the securing of justice in litigation. It has been said that 'the power and opportunity to cross-examine * * * is one of the principal tests which the law has devised for the ascertainment of truth, and is certainly a most efficacious test (Starkie on Evidence I. 129).' . . . In Jones v. Lazier, 195 Iowa 365, 372, 191 N.W. 103, 106, the court said: 'The right to pertinently cross-examine a witness is not a matter of the trial court's discretion. It is a valuable right essential to a fair trial upon any issue of fact, and prejudice will be presumed from its arbitrary denial.' In Schulte v. Ideal Food Products Co., 203 Iowa 676, 682, 213 N.W. 431, 434, the court said: 'The right of cross-examination of the adversary's witness is quite distinct in character from the right of a party to examine his own witness for the purpose of adducing facts. The right to cross-examine is quite absolute. It inheres in the right of the adversary to use the testimony of the witness at all. One of its purposes is to test the credibility of the witness.' See Eno v. Adair County Mut. Ins. Ass'n., 229 Iowa 249, 256 et seq., 294 N.W. 323, and authorities cited."

The language in the above decisions are wholly applicable here. The conduct of the Court prevented appellants from having a fair trial.

So too did the conduct of appellee's counsel. As can be seen from Appendix "A", he frequently interrupted cross-examination for the purpose of interjecting gratuitous observations and on several occasions was admonished not to make "speeches". Such "speeches" occurred at other times during the trial, culminating in his remarks, with respect to appellee's tax liability in the event of a verdict in his favor. That such remarks constituted misconduct is shown in Point VII, *supra.*

There exists another occasion where appellee's gratuitous statements before the jury also constituted prejudicial misconduct. It occurred as follows:

> "Mr. Galane: Plaintiff is willing to waive the instructions of the Court and present the arguments starting right after the luncheon recess. We feel that we trust your Honor's discretion as to how the instructions will be framed to the jury, and that counsel's function is simply to discuss with the jury at the summation the evidence that has been presented. I would be willing to start today to expedite the case." [T. 2725, lines 7-14].

Appellee's counsel knew the jury was impatient to get the case [T. 2724, lines 8-16]. Counsel's remarks were made for the purpose of unethically currying favor with the jury or having the jury infer that counsel was confident the jury would decide in favor of appellee and that the instructions were mere technicalities or both. In either event it was prejudicially improper. *Cf., Lancaster v. Texas,* 200 S.W. 167 (Tex. 1918), where the Court held improper a challenge by counsel to submit a case to the jury without argument. Appellee's counsel's accusation that counsel's statement was a falsehood (A-22, *infra*) also constituted misconduct. *Maxwell v. Durkin,* 57 N.E. 433, 434 (Ill. 1900).

It is submitted that because of the conduct of the Court and appellee's counsel appellants were deprived of a fair trial.

Conclusion.

For the reasons stated herein, the judgment should be reversed.

Respectfully submitted,

Samuel S. Lionel and Leo K. Gold,
By Samuel S. Lionel,
Attorneys for Appellants Elranco, Inc., El Ranco Hotel Operating Co. and Beldon R. Katleman.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief, is in full compliance with those rules.

SAMUEL S. LIONEL

APPENDIX A.

Cross Examination of Appellee.

(By Mr. Lionel):

Q. What were the names of some of the revues that were put on in the Cabaret Eve while you were associated with it? A. Eve or Nouvelle Eve. In the Cabaret Eve I put on some 30 shows. You don't expect me to remember all the names.

Q. Do you remember any of them?

The Court: What good does that do us, Mr. Lionel? What possible good?

The Witness: The answer is no.

The Court: If you were claiming that this man didn't put on shows like this, why, I could see some point of it. [T. 1399, lines 2-13.]

(Although there was no objection, Court interrupted cross-examination of appellee. Counsel belittled by Court.)

The Witness: The name of the corporation is Escarpolette. However, there were two other corporations that run the show before Escarpolette. The corporation La Nartella and the corporation La Nouvelle Eve to which La Nartelle entrusted its business to be managed.

By Mr. Lionel:

Q. What year was the La Nouvelle Eve Corporation formed?

Mr. Galane: If your Honor please—let the witness answer and then I will make—

The Interpreter: Pardon me?

Mr. Galane: Go ahead, sir.

The Interpreter: It was a society with limited responsibility.

Mr. Galane: If your Honor please, there was testimony about management of La Nouvelle Eve, the word management—

The Court: Are you objecting that it assumes a fact not in evidence?

Mr. Galane: That is correct.

The Court: Sustained.

Mr. Galane: And I am objecting to—

By Mr. Lionel:

Q. What year was the La Nouvelle Eve Corporation formed?

Mr. Galane: Objected to—

The Court: I sustain the objection upon the ground that that question assumes a fact not in evidence; namely, that it was ever formed.

By Mr. Lionel:

Q. Mr. Bardy, you said that the La Nouvelle Eve Corporation managed or exploited the business for the corporation—

The Court: Don't go into all that. We have heard what the testimony is. Just ask him a question.

By Mr. Lionel:

Q. When was the La Nouvelle Eve Corporation formed?

Mr. Galane: Objected to.

The Court: I just sustained the objection twice; namely, it assumes a fact not in evidence. Ask him if it was formed, if there was a corporation such as that.

By Mr. Lionel:

Q. Was there a corporation known as the La Nouvelle Eve Corporation which managed the La Nouvelle Eve Club for La Nartella?

The Court: Why don't you break that into two questions and it will be simplier. Ask him if there was such a corporation.

By Mr. Lionel:

Q. Was there a corporation which managed the La Nouvelle Eve Club for La Nartella?

Mr. Galane: Objected to upon the ground that the interpreter is taking the management, which means Gerance and so changing it as to lead Mr. Bardy to say that there was a society Gerance de La Nouvelle Eve. That was a French society, not a French corporation, to manage La Nouvelle Eve, and I now realize a corporation is intentionally designed so that the translator will use the word "manage." Say Gerance, to Mr. Bardy, and he says there was a societe de la Gerance de La Nouvelle Eve. We have a right to object to this framing a question in order to get an admission from the witness.

The Court: Sustained in that form. Rephrase it. [T. 1405, line 15, to 1408, line 8.]

(Although the appellee clearly testified there was a corporation La Nouvelle Eve the Court invited and sustained the objection that questions concerning such corporation assumed facts not in evidence. The Court belittled counsel and appellee's counsel made a speech.)

(By Mr. Lionel):

Q. But what was the name of the company or corporation that put on shows at the club prior to its closing in 1955?

The Court: Just a minute. Are you using company and corporation synonymously now? Up to this point

you have been using the name company. [T. 1423, lines 18-23.]

(Although no objection, the Court interrupted counsel. The question was fair and the Court's comment could be interpreted by the jury as though counsel was doing something improper.)

By Mr. Lionel:

Q. During those years, 1952 to 1954, was Nartella a tenant of Mansart?

The Interpreter: What is the name of that other society?

Mr. Lionel: Mansart.

The Witness: The Societe Nartella was a tenant of the Societe Mansart.

The Court: Let's not spend any more time back in 1954, 1955 and 1956. This lawsuit concerns something that started in 1958, as I understand it.

Mr. Lionel: Your Honor—

The Court: Let's not have an argument about it. It seems to me you have covered that enough.

Mr. Lionel: I am getting to the heart of it.

The Court: Well, let's get to it. [T. 1424, line 25, to 1425, line 14.]

(Although no objection interposed Court improperly limited cross-examination.)

(By Mr. Lionel):

Q. When did the Societe de la Gerance de La Nouvelle Eve go out of busines or stop putting on shows at La Nouvelle Eve?

The Court: Now, he said they never produced a show.

Mr. Lionel: I submit, your Honor, he said that first, but then he said they exploited shows at that club.

The Court: Well, of course, there again it is a question—you say "put on." What does that mean? He says "exploited." What does "exploited" mean? It may be like two ships that pass in the night. You may not understand each other.

Mr. Lionel: May I ask that again, your Honor?

By Mr. Lionel:

Q. Did the Societe de la Gerance de La Nouvelle Eve put on shows at the La Nouvelle Eve Club from 1952 to 1954? A. No.

Q. What did that—

The Court: Did they own the show? [T. 1425, line 23, to 1426, line 17.]

(Unwarranted interruption by Court of cross-examination.)

(By Mr. Lionel):

Q. Now, isn't it true that in 1954 when the club closed it closed because—

The Court: He said 1955, didn't he?

Mr. Lionel: I will rephrase that your Honor.

By Mr. Lionel:

Q. Isn't it true that you put out La Nartella and La Gerance de La Nouvelle Eve because they didn't pay the rent?

'The Court: He personally? Is that what you are saying?

Mr. Lionel: Yes, your Honor.

The Court: Let's say it to him. Isn't it true that he personally evicted? Is that it?

Mr. Lionel: Yes, your Honor.

The Court: These companies.

The Witness: It is true. [T. 1427, lines 4-20.]

(Unwarranted interruption by Court of cross-examination.)

Q. Do you have those assignments? A. I gave them, yes.

Mr. Galane: If your Honor please, could we have Exhibit 1 annexed to the deposition of Rene Bardy and take it out at this time?

The Court: You can take it out.

Mr. Galane: Fine.

The Court: If there is no objection. Do you want to offer a stipulation about it? Do you have the assignments?

The Witness: I gave them to my lawyer. I have the assignment only from the last society.

Mr. Galane: If counsel will continue, I will find them in here.

The Court: Proceed.

(Unwarranted interruption by Appellee's Counsel of cross-examination and approved by the Court.)

By Mr. Lionel:

Q. Was it unlawful for you to be one of the original shareholders in Escarpolette?

The Court: Now, you aren't going to want to ask him that, are you? He is a layman. You don't ask a layman if what he did was unlawful.

Mr. Lionel: Your Honor, we called the witness' testimony before—

The Court: Mr. Lionel, in fairness to the witness, you don't ask a witness a question—

Mr. Lionel: May I ask him if he knows, your Honor?

The Court: —a question of French law. That is a question I may have to decide or you may have to prove, if you claim that it is unlawful under French law for him to have done what he said was done.

Mr. Lionel: Would your Honor permit me to ask the witness whether he knows?

The Court: No, I wouldn't. How would he know? He is a layman.

Mr. Lionel: The witness testified before that he couldn't form it himself and he had these other people and had to give them money.

The Court: Well, of course, I don't know. That might have been something for tax purposes, it might have been a dozen different reasons.

Mr. Galane: That is not what he said, your Honor.

The Court: Pardon?

Mr. Galane: That is not what he said, sir. It is a distortion.

The Court: The jury heard what he said. Proceed.

By Mr. Lionel:

Q. Mr. Bardy, do you have the—

(Discussion off the record.)

By Mr. Lionel:

Q. Mr. Bardy, where did you say the assignments of the interest of Guiol and Francois were?

The Court: He just said he gave them to the lawyer, didn't he, and his lawyer has them. I assume if you will ask—if you gentlemen are speaking to each other —you might ask the attorney for the plaintiff—

Mr. Galane: At the last meeting we were speaking, your Honor.

The Court: —if he has them, and you gentlemen might get going and stipulate what they are and not take the time of us here on this matter.

Mr. Galane: These are the photostats of what Mr. Bardy attached to his deposition. So far as I know, these are the blank assignments by Guiol and Francois. I know nothing more than I am sure counsel for the Hotel knows.

The Court: You are not accepting them; is that it?

Mr. Lionel: May I ask the witness more questions?

The Court: You mean about this?

Mr. Lionel: Yes.

Mr. Galane: May we mark these and have the witness interrogated?

The Court: Yes, the exhibits may be marked. Do you want them placed before the witness?

Mr. Lionel: I would like to ask another question or two with respect to the originals.

The Court: You may ask him all the questions you like with respect to the originals.

By Mr. Lionel:

Q. Mr. Bardy, do you—

The Court: Let's get these identified in the record. What are they, Mr. Clerk?

The Clerk: Plaintiff's Exhibit 546 for identification.

The Court: Plaintiff's Exhibit 546 for identification.

By Mr. Lionel:

Q. Mr. Bardy, I show you what has been marked for identification as Plaintiff's 546.

The Court: Are these in French or English?

Mr. Lionel: French, your Honor. [T. 1429, line 9, to 1432, line 23.]

(Counsel's questions were proper. Court's comments could be interpreted by jury to mean counsel was being unfair to witness. Court's comment re. tax purpose could be interpreted as approval by Court of appellee's actions. Appellee's counsel's interruption to get exhibits marked and appellee questioned concerning them improper but approved by Court.)

(By Mr. Lionel):

Q. Now, did Escarpolette have shows at the La Nouvelle Eve?

The Court: What do you mean "have shows"? [T. 1433, lines 9-11.]

(Unwarranted interruption by Court of cross-examination.)

(By Mr. Lionel):

Q. Who ran the business at the Club during those three years?

The Court: You mean who owned the business? [T. 1433, line 24, to 1434, line 1.]

(Unwarranted interruption by Court of cross-examination.)

(By Mr. Lionel):

Q. Was she a singer in the 1958 show called Shocking? A. I have to refer to the program.

The Court: Does it matter? [T. 1436, lines 21-24.]

(Singer was Tanya Floria, one of appellee's dummies. The question was proper and interruption unwarranted and belittled counsel.)

(By Mr. Lionel):

Q. During the years 1956, 1957 and 1958, who paid the payroll at the La Nouvelle Eve?

The Court: Club?

Mr. Lionel: Club.

The Court: Do you understand the question? [T. 1437, lines 21-25.]

(Unwarranted interruption by Court of cross-examination.)

Q. What else did Mr. Bardy pay for in the 1956 show Extravaganzas? A. I paid everything that had reference to the show.

The Court: Can't we move up to 1958 now and get up to the time when we are really talking about a show that was brought to Las Vegas?

Mr. Lionel: If the Court please, on direct examination the witness testified he spent $200,000.

The Court: You haven't asked him about any money yet. He is testifying about an arrangement—

Was that arrangement you made with the authors society, was that to save the taxes?

Put that to him, Mr. Interpreter.

The Witness: Yes, your Honor.

The Court: Proceed, Mr. Lionel.

The Witness: The question of societies was always a question of making declarations.

The Court: What are declarations, tax returns?

The Witness: Regarding the income in the year, tax returns.

The Court: Tax returns. [T. 1438, line 16, to 1439, line 12.]

(Appellee had testified on direct that he had spent $200,000 since 1956 and was now claiming damages for loss of his property. The question was proper. Counsel should not have been limited. Again the Court makes appellee's peculiar transactions appear legal because motivated by tax considerations.)

(By Mr. Lionel):

Q. And yet all the revenue which came from the people who saw the show went to Escarpolette?

Mr. Galane: That is objected to as not based upon evidence.

The Court: Argumentative; sustained. [T. 1440, line 23, to 1441, line 2.]

(The Court sustained an objection although made on an improper ground.)

The Court: How much longer do you estimate you will be, Mr. Lionel?

Mr. Lionel: At least a day, your Honor.

The Court: No you won't. I will give you tomorrow morning at the outside. I am not going to permit this to go on interminably. Now, this witness has told you that he had a deal, he had a lot of tax arrangements, but he told you he had a deal whereby anything put on outside that club was his responsibility and belonged to him. Now, I assume he is going to say that as long as he stays on the stand. If you have anything to impeach him with about it, let's get down to the business of impeachment about it, and let's not try every show that has ever been in that club. He has told you just exactly what his story is. Now, you don't have to accept it, but unless you have something to discredit it, let's move on to something else.

Mr. Lionel: Your Honor, can't I discredit that story by having him repeat it and showing how incredulous it is?

The Court: I don't know whether you can or not. You can argue how incredulous it is. He told us what the situation is. I don't assume he is going to change it if you ask him about 40 different years up there, or anything else. Now, if you have something that you have to go at to discredit what he said, let's get to it. I believe in cross-examination if it discredits a witness. I don't believe in the kind of cross-examination that permits a witness to tell his story three or four different times. I don't think it helps us, and we don't need it. You have his story. Now, if you are going to impeach him, let's get about it, get about discrediting him. Otherwise I am going to cut you off, I warn you. I will just have to do it. We can't put on every show that they have ever put on in this club.

Mr. Lionel: Three years at the same club that was involved in 1958 when the contract was made there is one society only. I have a right to cross-examine on that.

The Court: You are. What have you been doing all afternoon but cross-examining him on it? He says the Club Escarpolette, whatever you call it, whether you call it an anonymous society or limited company, whatever it is, he said they, in effect, ran the club; they took in the receipts and he had this side arrangement where he split up the income, I suppose, to save taxes. It seems pretty obvious, but the crucial thing he says is he had a deal whereby when the show went out of that club for any place other than that club, that he was responsible, and that he put it on and he got the income from it. Now, that is his story.

Mr. Lionel: I am coming to that one, your Honor.

The Court: All right, let's get over with it. I don't assume he is going to change. You may discredit it. Now, let's get at it, right down to the meat of the thing.

Mr. Lionel: I am trying to proceed as rapidly as I can.

The Court: We haven't come up to the year 1958 yet. We have been all afternoon on '52, '53, '54.

Mr. Lionel: These were matters that were gone into on direct examination, your Honor, to show the background, in an attempt to show secondary meaning. They brought in the Paris Herald and other papers starting in the year 1950, your Honor.

The Court: Oh, there are a great many documents in evidence.

Mr. Lionel: Your Honor, I have a right to show, I believe, on cross-examination—I say that respectfully

—what the situation was; that they couldn't stay in business during those years. I should have a right.

The Court: You have gone into it.

Mr. Lionel: I have gone to the next subject after I felt I was through. I have never in my life previously examined in depositions, court or otherwise, a witness who did not speak English. This is the first time I have ever done it. It is a difficult problem.

The Court: It is a difficult problem. That is what makes it difficult for all of us.

Mr. Lionel: I recognize that.

The Court: Now, as I say, he told a story. Of course, you don't have to accept the story, you may discredit it in any way you can. Let's see if we can't organize it where we can start at 9:30 and you be through by 12:00. [T. 1441, line 21, to 1444, line 23.]

(Improper limitation on cross-examination. Court told jury what appellee had testified to and that counsel had failed to discredit appellee on his story. Whether witness was discredited was for the jury to determine. Court belittled counsel.)

(By Mr. Lionel):

Q. Does the Hotel's Exhibit No. 1 represent or show the La Nouvelle Eve Club as it has appeared within the last 30 days?

Mr. Galane: Your Honor please, we will certainly stipulate, if counsel for the Hotel represents he had these pictures taken, we will stipulate they may go into evidence, and we will not spend any further time on it.

The Court: Very well. [T. 1447, lines 2-9.]

(Improper interruption by appellee's counsel and approved by the Court.)

(By Mr. Lionel):

Q. Do you have a copy of that, Mr. Bardy? A. No.

The Court: Do you mean with him or anywhere in the world, or—[T. 1449, lines 18-21.]

(Unwarranted interruption of cross-examination.)

(By Mr. Lionel):

Q. Is it not then true that there was no written lease between Mansart and Escarpolette?

The Court: At what time? [T. 1456, lines 12-14.]

(Escarpolette was tenant in 1958 only. Question was proper and the interruption unwarranted.)

(By Mr. Lionel):

Q. What month did Escarpolette go out of business? A. In December, 1958.

Q. What was the reason it went out of business in December of 1958? A. There was no particular reason. It was decided to terminate it.

Q. Was that because it was convenient to you? A. Yes, it was convenient for me.

The Court: Was it for tax purposes? [T. 1456, line 20, to 1457, line 3.]

(Unwarranted interruption of cross-examination. Again implication by Court that tax purposes puts stamp of legality on appellee's corporate dealings.)

By Mr. Lionel:

Q. Mr. Bardy, I show you Hotel's Exhibit B, and ask you whether you have ever seen the French portion of that exhibit.

The Court: Will you stipulate that he has, and we will save time on that? [T. 1458, lines 20-24.]

(Jury has right to observe demeanor of a party. Counsel should not be required to stipulate facts during cross-examination of a party.)

Mr. Lionel: Q. Is it not true, Mr. Bardy, when Escarpolette went out of business Escarpolette had no money, no property, no assets?

Mr. Galane: If your Honor please—

The Court: What do you mean, "when it went out of business"? Do you mean when it was finally liquidated?

Mr. Lionel: No, your Honor, at that time.

Mr. Galane: If you Honor please—

The Court: Just a moment. Yes, but specify, because it could mean, I take it, that any company that is finally liquidated has nothing left, but the question is as of when you are speaking. When does your question apply?

Mr. Lionel: I will rephrase it, your Honor.

By Mr. Lionel:

Q. In December of 1958—

The Court: At the time of this resolution?

Mr. Lionel: Yes. [T. 1465, lines 5-22.]

(Unwarranted interruption of cross-examination.)

(By Mr. Lionel):

Q. I take it then from your testimony, Mr. Bardy, that the only copies of these two assignments are those which are attached to Plaintiff's 546 for identification? A. Yes, I agree.

Q. Isn't it true that whoever has the original can insert his name?

The Court: Are the originals available?

Mr. Galane: I don't know, your Honor. I have the impression, though, that Mr. Bardy said yesterday that the originals were in Paris. Now, that is my recollection, and at this moment I don't know.

The Court: Well, you don't have them?

Mr. Galane: I don't have them. We gave them these copies to the deposition. I assume Mr. Bardy—

The Court: Now, don't make a speech.

Mr. Galane: All right. We don't have them, sir.

The Court: As to the last question, why, I suppose you don't need to ask that; if someone has it they can write. If there is a blank they can fill the blank.

Mr. Lionel: Well, could we also then have a stipulation—

The Court: They are able to fill the blank, I assume. Whether they may lawfully do it, or with propriety do it, may be another question.

Mr. Lionel: I will offer in evidence—

The Court: Ask him who has the originals.

Mr. Lionel: He said he didn't know. He testified he didn't know where they were.

The Court: He didn't testify he didn't know who had them. [T. 1468, line 13, to 1469, line 17.]

(Unwarranted interruption by the Court. Speech by appellee's counsel.)

(By Mr. Lionel):

Q. Do you know what the letters P.P. stand for? A. For myself and for my artists, for my troupe.

Q. Do you know what the letters P.O. mean when used in front of a signature?

Mr. Galane: If you Honor please—

The Court: Is that in French, now?

Mr. Galane: That is objected to.

The Court: Is this American?

Mr. Lionel: I am talking about when Mr. Bardy uses it.

The Court: Don't ask him if he knows what it means. Ask him what he means by it when he signs, not what he knows by it.

Mr. Galane: If your Honor please, they are switching letters from P. P. to P. O.

The Court: I don't know what the purpose of it is. [T. 1472, lines 8-23.]

(Unwarranted interruption by the Court. Accusation by appellee's counsel.)

(By Mr. Lionel):

Q. Mr. Bardy, I show you—

The Court: Is P. P. a French expression, does the record show? I haven't heard it. What does P. P. mean? Does it mean something in French?

The Interpreter: Yes, it does.

The Court: Now, you aren't testifying. Don't you get in this.

Mr. Foley: That would be a matter—

The Court: Can we have a stipulation about it, or shall we ask the witness?

Mr. Galane: I would like to ask him, your Honor.

The Court: Mr. Bardy—

Mr. Lionel: Your Honor—

The Court: Mr. Bardy, does P. P. mean something in French?

The Witness: It doesn't mean anything.

The Court: Well, is it an abbreviation for two words?

The Witness: As far as I am concerned, it was an abbreviation for myself.

The Court: Is it an abbreviation of some French words?

The Witness: Yes, it is an abbreviation.

The Court: Of what words?

The Witness: For myself and for my troupe.

The Court: But what are the French words that P. P. is an abbreviation of?

The Witness: There is no abbreviation. I signed for—

(Witness writes on piece of paper.)

The Interpreter: I was handed here two lines written by Mr. Bardy.

The Court: Show it to counsel.

In English, when we put something at the end of a letter—I am speaking now to him—in English when we put something at the foot of a letter we say "P.S." That means post script.

The Witness: In French the same.

The Court: Very well. What does P. P. mean in French?

The Witness: If I was—If my name was Peter, I would put a "P" for "Peter" before my name.

The Court: But your name is Rene; is it not?

The Witness: Rene Felix Louis Francois.

The Court: Very well. When you sign your name and put P. P. in front of it, what does that mean in French?

A. It depends what I am writing. I am not always using the symbol P. P.

The Court: Do others in France when they sign a legal document, put P. P. in front of their name?

The Witness: You know, it is an abbreviation.

The Court: Of what?

The Witness: I just told you, indicating the written text.

The Interpreter: May I translate?

The Court: Read it.

The Interpreter: (Reading paper written by witness) The text says "For myself and for my troupe, P. P."

The Court: Well, what are the French words P. P.? Is that an abbreviation of French words?

The Witness: There is no abbreviation. It is an abbreviation for myself.

The Court: Well, is it commonly used in France?

The Witness: I am using it for the purpose of writing, P. P.

The Court: Do others use it? [T. 1473, line 17, to 1476, line 5.]

(Unwarranted taking over of cross-examination by the Court on a vital matter.)

(By Mr. Lionel):

Q. And have you used them on contracts?

A. When I am signing for one of my societies, and signing as the president of the Societe Escarpolette, I sign always as the president of the societe Mansart. If as I am making a society with names that have been given to me for the use, for that purpose.

The Court: What do you sign? What do you write when you sign as president of one of your societies?

The Witness: For the Societe Mansart, I am signing the president, Rene—

The Court: But what do you write? Just tell us exactly how you write it.

[T. 1476, line 16, to 1477, line 2.]

(Unwarranted interruption by Court of cross-examination.)

By Mr. Lionel:

Q. Now, did you ever sign for La Nouvelle Eve Corporation P. P. Rene Bardy?

A. I just told you yes. It is marked here.

The Court. It is marked there P. O. The question is did you ever sign P. P.?

The Witness: I could put the initials of all my four names in front of my signature. Nobody could prevent me from doing so.

Mr. Galane: If your Honor please, I would stipulate—I thought we had yesterday—there was a French document P. P. I think it should be stipulated that there is in evidence as—I ask Mr. Pratt the number—a French translation of a contract—

The Court: Well, you get up your own numbers.

Mr. Galane: I think it is Exhibit 90 and Exhibit 472. The translation says "La Nouvelle Eve Corporation, P. P. R. Bardy." I think I can stipulate to that.

The Court: Offer a stipulation and give the exhibit number.

Mr. Galane: No, this one doesn't have it. 90, does that have P. P. R. Bardy?

A Juror: It is 90.

Mr. Galane: I will stipulate 90 has P. P. R. Bardy.

The Court: It speaks for itself, doesn't it?

Mr. Galane: That is my recollection of the evidence.

The Witness: Moreover, it was a document of courtesy.

The Court: Do you accept that stipulation?

Mr. Lionel: I accept that stipulation.

The Court: That applies to what, Exhibit 90?

Mr. Galane: 90 says, "P. P. R. Bardy, stage name La Nouvelle Eve." [T. 1483, line 16, to 1484, line 21.]

(Unwarranted interruption of cross examination by Court and appellee's counsel. Court approved interruption by appellee's counsel to offer a stipulation. Again a speech by appellee's counsel)

(By Mr. Lionel)

Q. Did she have anything to do with the shows at La Nouvelle Eve?

The Court: You mean the club?

Mr. Lionel: The club.

The Court: In Paris? [T. 1485, lines 18-22.]

(Unwarranted interruption by Court of cross examination)

(By Mr. Lionel)

Q. Was she listed as the author of the shows at La Nouvelle Eve?

The Court: Didn't we go over all that yesterday, that she was a member of the authors society and he used her name to collect an author's fee, and he gave her a commission, and he took the rest of it? Didn't we go over all that yesterday?

Mr. Lionel: Yes, your Honor. This is cross examination, I submit.

The Court: Very well, proceed. You aren't asking him cross examination questions about it. [T. 1486, line 5-15.]

("Yesterday" had been direct examination. The question was proper and the interruption was warranted. Court's comment belittles counsel)

(By Mr. Lionel)

Q. I call your attention to the fact that the first page is dated November 25, 1958, and the rider attached to that, the additive, refers to a contract dated December 1, 1958—

The Court: Does the record show who prepared this document? [T. 1489, lines 11-16.]

(Unwarranted interruption by Court of cross examination)

The Court: Do you have what you say is the original?

Mr. Lionel: Yes, your Honor.

The Court: Well, why hasn't it come out before now?

Mr. Lionel: Because it is the Plaintiff's exhibit to Mr. Gerber's deposition. They had it.

Mr. Galane: Excuse me. Mr. Gerber produced documents on that deposition. That is a falsehood. We did not produce documents for Mr. Gerber.

The Court: I don't understand why you have copies made and given to the jury when you claim that you had a copy; that this was not the contract, and you had a document, Mr. Lionel, which you said was a contract.

Mr. Lionel: Your Honor, at the time that 90 was issued, I did not have that document, and I found it later. We found it attached to Mr. Gerber's deposition.

Mr. Galane: Your Honor, I would like them to produce Beldon Katleman's signature on any other document in this case but what Mr. Bardy has. I haven't seen it yet after almost three years of depositions. They haven't produced a signature of Beldon Katleman.

The Court: Proceed, Mr. Lionel. What is the question?

Mr. Lionel: Would you read the last question back?

The Court: This document is in English. I assume it was not prepared by this witness, unless you think he can read English. I don't know why you should put any question to him about the dates. I don't assume he prepared it. Now, if you gentlemen can't stipulate as to who prepared Exhibit 90, then— [T. 1491, line 1, to 1492, line 4.]

(Appellee's counsel accuses appellant's counsel of lying. Speech by appellee's counsel re. Katleman's signature is deliberate misconduct)

The Court: And you represent that you have never known until when?

Mr. Lionel: That I have never seen this document until about five or six days ago when I asked Mr. Pratt to see Mr. Gerber's deposition.

Mr. Galane: Would counsel afford me the courtesy? I would like to see Mr. Katleman's signature.

Mr. Lionel: I am talking about the first page that Mr. Bardy has.

Mr. Galane: I would like to know where Katleman's signature is. For three years I have been asking this, after 30 depositions in this case, where on the first page is the Katleman signature? I still ask it, sir. They take—

The Court: Now, just a moment. Proceed.

Mr. Lionel: May I have Exhibit—

The Clerk: Here is the folder. I don't know what you want out of it.

Mr. Lionel: Plaintiff's A.

The Court: If you are going to spend time with Mr. Bardy asking him about the preparation of a document which you all agree he did not prepare, then that will take time out of your cross examination, Mr. Lionel. [T. 1492, line 23, to 1493, line 19.]

(Again unwarranted remarks by appellee's counsel concerning Katleman's signature. Again limiting and hurrying cross examination)

(By Mr. Lionel)

Q. Did you propose any changes to it?

A. Yes. For instance, on this page, indicating a handwritten addition.

The Court: Handwritten addition?

The Witness: Yes.

The Court: A handwritten addition?

The Witness: Yes.

The Court: Whose handwriting is that?

The Witness: It comes from the impresario in Paris. That should be Mr. David Stein.

The Court: David Stein. [T. 1495, lines 11-21.]

(Unwarranted interruption by Court of cross examination)

By Mr. Lionel:

Q. Mr. Bardy, did you ever sign a first page to the contract which bore the date of December 1, 1958?

The Court: Do you have such a document?

Mr. Lionel: I certainly do.

The Court: Show it to the witness.

Mr. Galane: I will stipulate they have it, but no signature of Beldon Katleman. [T. 1496, line 25, to 1497, line 6.]

(Unwarranted interruption of cross examination by Court. Again appellee's counsel interjects re. Katleman's signature)

By Mr. Lionel:

Q. Mr. Bardy, did you ever see Hotel's Exhibit E before?

The Court: Is it in the English language?

Mr. Lionel: Yes, your Honor.

The Court: Are you trying to show it has his signature?

Mr. Lionel: Yes, your Honor.

The Court: Ask him if his signature appears on it. Don't ask him if he ever saw an English document before. I wouldn't want anyone to ask me if I ever saw

a French document before. If it bore my signature, that is another thing. [T. 1497, line 25, to 1498, line 11.]

(Court's comment subject to implication counsel unfair to appellee)

(By Mr. Lionel)

Q. And that is what you wrote under the words, "La Nouvelle Eve Corporation, Artist, P. P. R. Bardy"?

Mr. Galane: Objected to, your Honor, upon the ground the document is not yet in evidence, and counsel for Mr. Katleman is reading terms the way he chooses when he asks the question. He could ask if it is his signature. The document is still not in evidence. I object upon that ground.

Mr. Lionel: I am trying to lay foundation.

The Court: He said he signed—he did not sign the original, but as I understand it, this is a photostatic copy, but he did not sign the original, as I understand the testimony.

Is that your understanding?

Mr. Lionel: No, your Honor.

The Witness: I am trying to explain—

The Court: Is that your signature on the third page of Exhibit D? Is that your signature, "P. P. R. Bardy"? [T. 1502, lines 8-24.]

(Unwarranted interruption by Court and appellee's counsel. Appellee's counsel accuses counsel of improper conduct)

(By Mr. Lionel)

Q. Mr. Bardy, I refer you to Plaintiff 90A. Is it not true the date of the first page of that exhibit is November 25, 1958?

The Court: It speaks for itself. I will sustain my own objection.

By Mr. Lionel:

Q. Mr. Bardy, did you ever sign a first page of a contract with the Hotel after November 25, 1958?

The Court: You mean dated some date after? [T. 1503, lines 16-25.]

(The latter question was a proper one. The interruption was not warranted)

(By Mr. Lionel)

Q. Mr. Bardy, is it not true that Hotel's Exhibit E, which you signed, bears the date of December 1, 1958?

A. It is dated December 1, 1958. However, this date cannot exist, because this is a contract which has been prepared before the date of November 25, 1958.

Q. Mr. Bardy—

The Court: Now, let's move on to something else. I assume Mr. Katleman will testify in this case?

Mr. Lionel: Yes.

The Court: Is it possible that under this arrangement that we have to have all this dispute about what is the contract between these business organizations?

Mr. Lionel: Your Honor, I worked until early this morning attempting to find the correct chain. These things went back and forth across the ocean like hail and rain and snow.

The Court: Very well.

Mr. Lionel: I should have a right to show—

The Court: These are English documents. Don't waste time. You have heard what this witness said.

Mr. Lionel: But, your Honor, please understand the problem. They have introduced an exhibit which is

dated November 25th which has a rider referring to December 1st.

The Court: What does the date have to do with it? What we are interested in is what is the final copy of the agreement. Now, certainly, doesn't the Hotel have a copy of it? Doesn't MCA have a copy of it?

Mr. Lionel: The MCA copy is attached to Gerber's deposition, and this is it, and we are trying to put it in.

The Court: I am not asking you to testify about it. Don't you gentlemen expect to offer something from your files? Now, the most he can say, apparently, is this is his signature.

Now, you have established that. Now, what else can he say about it? It is in the English language, which apparently he doesn't understand.

Mr. Lionel: Well, we feel we have a right to offer it on that basis, because that is the only identification he made of Exhibit 90A.

The Court: Assume if Mr. Katleman testified, or if someone else testified besides this plaintiff in the case, then I assume you can lay a further foundation and offer it. [T. 1504, line 20, to 1506, line 11.]

(Unwarranted interruption by the Court. Whether Katleman would testify and on what subject was for his counsl to determine. Counsel has right to elicit relevant information from adverse party on cross examination. Again Court rushed cross examination.)

By Mr. Lionel:

Q. Do you have any contracts showing those times that it appeared in those places? A. I had some, but I am not sure that I didn't—gave them to my lawyer.

The Court: Which lawyer?

Mr. Galane: I have contracts on Nice and Cannes, your Honor.

The Court: Why don't you tell—

Mr. Galane: That was the first I heard, sir.

The Court: Now, you gentlemen are supposed to exchange all documents.

Mr. Galane: They have had it since November, your Honor, the list of documents, and the first I heard they were going to ask for it was one moment ago, and they have had my list now since November, sir.

The Court: What exhibit is it?

Mr. Galane: If they will just give me a minute.

Mr. Lionel: I have them all together now with translations.

Mr. Galane: One moment. I think 60 may be—59 and 60 may be the Riviera contracts for 1958, and I think 61 may be a Riviera contract. Do you want the German contracts, 63 and 64, so we have them all out now?

By Mr. Lionel:

Q. Mr. Bardy—

The Court: Will you want 63 and 64, the German contracts?

Mr. Galane: That is the Dusseldorf and Hanover contracts.

The Court: Will you want those?

Mr. Lionel: No, your Honor. [T. 1526, line 15, to 1527, line 21.]

(Unwarranted interruption of cross examination by Court. Interjections by appellee's counsel wholly improper, but approved by Court)

By Mr. Lionel:

Q. Wasn't there a lawsuit about that?

The Court: What would be the purpose of all this?

Mr. Lionel: To show, your Honor, they have attempted to establish secondary meaning to show that this show was a big success. We should have a right to show that this is not true. [T. 1531, line 21, to 1532, line 1.]

By Mr. Lionel:

Q. Did any problem arise over the Dusseldorf show?

Mr. Galane: That is objected to as too ambiguous.

The Court: Sustained.

Mr. Lionel: I haven't finished the question.

The Court: It would be a strange undertaking if some problems didn't arise.

By Mr. Lionel:

Q. Mr. Bardy, who was the author of the La Nouvelle Eve show which appeared in Dusseldorf in 1958? A. Mr. Bardy.

Mr. Lionel: May we open Mrs. Deryckere's deposition for a moment?

The Court: Can it be stipulated that she was represented as the author of these matters?

Mr. Galane: If they have—

The Court: Or the society for the purpose of getting royalties and dividing them with the plaintiff? Is that what you want?

Mr. Lionel: I want to go beyond. I am going to this witness' credibility.

Mr. Galane: If they are, sir, we want Mrs. Deryckere's letters put in at the same time.

The Court: You mean as to whether or not she is actually the author? Is that what you mean?

Mr. Lionel: I am trying to lay a foundation for a letter by Mr. Bardy at this moment with respect to that situation.

The Court: Why don't you ask him about the letter, then, and not ask him this question?

By Mr. Lionel:

Q. Mr. Bardy—

The Court: He said, as I understand, that she has been registered as the author and that she gets a royalty as an author and that she gets something out of it and gives him the rest of it. Do you want to impeach him on that?

Mr. Lionel: With respect to this situation—well, your Honor, this I think goes to show—this is very crucial, I feel. I would rather not argue it in front of the jury, your Honor.

The Court: Very well, go ahead, if you feel it is. I thought he had covered it yesterday. [T. 1533, line 13, to 1535, line 5.]

(Interruption by Court makes light of appellee's scheme re. author's royalties. Requirement of stipulation during cross examination improper. Demand by appellee's counsel re. Deryckere's letters deliberate misconduct)

By Mr. Lionel:

Q. Mr. Bardy, I show you what has been marked for identification as Hotel's Exhibit H, and I ask you whether or not that is not a copy of a letter you wrote to the person whose name appears therein. A. Yes, it is a copy.

Mr. Galane: Your Honor, the witness said "To Mr. Morazzani," and the interpreter says, "Yes, it is a copy." Now, he not only said this in French, it was Ital-

ian. He said Mr. Morazzani, and I think he said who he is. He is the head of the Authors Society, and I would appreciate it if the jury—

The Interpreter: He didn't say it.

Mr. Galane: He said Mr. Morazzani.

The Court: Wait a minute. You are not the Interpreter, and I will not permit you to argue with the Interpreter any more than I would the Reporter. If the Reporter has it down one way, that is the way it is. We have to have someone who is official, and this is an official interpreter, and if he says the witness said so and so, then the jury is the only one who can dispute it. [T. 1535, line 8, to 1536, line 2.]

(Appellee's counsel argues with interpreter and makes speech)

By Mr. Lionel:

Q. Directing your attention again to Exhibit H, Mr. Bardy, did your name appear on the original under the words—

The Court: What is this document now?

Mr. Lionel: It is a letter sent—

The Court: Is it marked?

Mr. Lionel: It is Exhibit H.

The Court: It is Exhibit H. Well, it speaks for itself, doesn't it?

Mr. Lionel: Except, your Honor, that this is a copy produced by the plaintiff, which apparently has a little area that didn't come out on the photocopying process, and I would like to establish Mr. Bardy's name appeared in that area.

The Court: You mean he signed, or his name appeared in printing?

Mr. Lionel: Printing, probably.

Mr. Galane: We may stipulate, if they will let us see it, sir.

The Court: Why not print it in there, if you can stipulate to it?

Mr. Lionel: I don't see Mr. Bardy there.

(Discussion off the record.)

The Court: The question is, is it so stipulated?

Mr. Galane: We can't, no, sir.

By Mr. Lionel:

Q. Mr. Bardy, on Exhibit H, did your stationery have the name Rene Bardy under the words,

"NEE ARTISTIQUE 'VARIETY'

"representee par"?

The Court: Stop him, Mr. Interpreter, and tell us what he is saying.

The Witness: The register of commerce is not a society. It was Mr. Doornick.

The Court: The question is, did your name appear up there in the upper left-hand corner of that letter?

The Witness: In the tribunal of commerce this title Artistique Variety—

The Court: That is not the question. The question is did your name appear in the upper left-hand corner of that letterhead? Yes or no.

The Witness: It is a photostatic copy. It is not on the photostatic copy.

The Court: Did it appear on the original?

The Witness: It was signed, but it didn't appear on the photostatic copy. [T. 1537, line 14, to 1539, line 10.]

(Unwarranted interruption and taking over of cross examination)

(By Mr. Lionel)

Q. And she was working, you say, with the costumes at La Nouvelle Eve? A. Yes, she was in charge of the costumes.

The Court: Was she an author?

Mr. Lionel: I beg your pardon?

The Court: Was she an author? [T. 1542, line 24, to 1543, line 4.]

(Unwarranted interruption by Court of cross examination)

(By Mr. Lionel)

Q. Mr. Bardy, when did you first meet Harold Conner?

The Interpreter: First meet—

The Reporter: Harold Conner.

The Court: The Las Vegas accountant.

The Witness: When we begun it was at the end of January, 1959.

By Mr. Lionel:

Q. Was a bank account opened for the show? A. Yes, a bank account was opened for the show.

The Court: Isn't that all admitted and in evidence? The checks are in evidence, aren't they?

Mr. Lionel: Well, the jury has only seen one of them.

The Court: They see everything in evidence.

Mr. Galane: Everything is in evidence, the whole safety deposit box.

Mr. Lionel: I have a problem. We have a document, and the jury's attention is not called to it. I want to be sure I am able to argue that, in view of your Honor's ruling.

The Court: You mean the checks?

Mr. Lionel: Yes, your Honor.

The Court: Anything that has to do with this issue, as to in what name the contract with the Hotel was made, you may call attention to. You don't need to read all those checks.

Mr. Lionel: I don't intend to.

The Court: It shows what it shows, does it not?

Mr. Lionel: Yes.

The Court: And the name in which the account was, and the checks, and it is stipulated as to signature; is it not?

Mr. Galane: Yes. I think for one part of the time it was Mr. R. Bardy and Harold Conner. Then when Mr. Bardy left it was Peter Holmes and Harold Conner. Am I correct?

Mr. Lionel: I would like to ask about it generally. [T. 1543, line 25, to 1545, line 9.]

(Unwarranted interruption by Court of cross examination. Unwarranted interjections by appellee's counsel)

(By Mr. Lionel)

Q. Mr. Bardy, did you sign any signature cards on the account for the show in Las Vegas?

The Court: Are they here?

Mr. Lionel: No, your Honor.

The Court: May it be stipulated he did? He had to.

Mr. Galane: Your Honor—

The Court: May it be stipulated that he did?

Mr. Lionel: I don't know.

The Court: For the purpose of this case?

Mr. Galane: The bank wasn't able to produce cards for me.

The Court: No cards on the account at all?

Mr. Galane: I have been inquiring for three years, and they have no cards. I subpoenaed Mr. Giannoti. He checked for me. No cards.

The Court: No signature cards?

Mr. Galane: Not a signature card, not a record in the Bank of Nevada, and I talked to the top officials.

The Court: Is this the Las Vegas way of doing business?

Mr. Galane: I don't know sir. I talked to the top officials of the Bank of Nevada.

The Court: Don't testify now. May it be stipulated that the signatures of Rene Bardy and Harold Conner were on the bank cards?

Mr. Galane: I know it was on some checks. That is all I can stipulate to, sir. I can't stipulate to something I have never seen.

The Court: Well, the checks were honored.

Mr. Galane: Yes, and I have seen his signature on checks. I have never seen the card.

The Court: Proceed. [T. 1546, line 4, to 1547, line 10.]

(Unwarranted interruption of cross-examination by Court. Improper attempts by Court to get stipulation on important issue. Speeches by appellee's counsel)

By Mr. Lionel:

Q. Before you left for Paris on March 6, 1959, didn't you have Peter Holmes' name put on that bank account instead of yours? A. I wasn't in the bank. They brought me a card. I gave the signature for the bank, because two signatures were necessary for signing checks. As I was going back to Paris and couldn't sign, I gave the right to sign to Mr. Peter Holmes.

Q. And you signed something so that Peter Holmes could sign?

The Court: He has answered it. He has answered it. Go ahead with something else.

By Mr. Lionel:

Q. Did you read it before you signed it, Mr. Bardy? A. It was in English. I was told that it was for the purpose of the signature. I signed it.

Q. Did Mr. Holmes tell you that? A. It was Mr. Conner who asked me to sign.

Q. Was Mr. Holmes there at the time you signed it? A. Yes.

The Court: "It" being, I take it, a signature card?

Mr. Lionel: Either a signature card or a power of attorney, your Honor.

The Court: Do you have any documents?

Mr. Lionel: No, but I am advised—

The Court: I don't want any testimony.

Mr. Lionel: I do not have them at this time, your Honor.

Mr. Galane: At this time—

The Court: You don't have any at this time. All of the documents in this case are supposed to have been in long ago.

Mr. Lionel: This would be rebuttal, your Honor.

The Court: It doesn't matter what it is. It should have been in the hands of the Clerk. If you have any documents, even though impeaching documents, I told you gentlemen they may be filed with the Clerk under seal, any impeaching documents or rebuttal documents will be marked and be in the hands of the Clerk.

Mr. Lionel: These are bank records that will have to be subpoenaed.

The Court: They should be here.

Mr. Galane: Your Honor—

The Court: It isn't right to ask the witness about documents and not have them before him. Now, are you representing that you have under subpoena some signature cards and so forth from the bank?

Mr. Lionel: No. I represent that I have spoken to the man in the bank who said—

The Court: I didn't ask what he said.

Mr. Lionel: I cannot make the representation your Honor inquired about.

The Court: Proceed.

By Mr. Lionel:

Q. Who took care of the records for the show in Las Vegas?

The Court: Is it stipulated Mr. Conner did? Isn't that the stipulation? Isn't it stipulated, Mr. Galane, that Mr. Conner took care of the records of the show?

Mr. Galane: So stipulated. [T. 1547, line 23, to 1550, line 9.]

(Interruption of cross-examination. Limiting and rushing of cross-examination. Belittling of counsel. Imputing unfairness to counsel. Requiring counsel to stipulate.)

By Mr. Lionel:

Q. Mr. Bardy, to whom did the Hotel make the weekly payments? A. To the artists. It means—

The Court: Aren't you going to be able to show that? You represent the Hotel. I assume you have the records. What difference does it make?

Mr. Lionel: Well, your Honor has permitted the witness to testify that he didn't receive money, and I want to show that he was never given any money.

The Court: Can't it be stipulated as to how the payments were made?

Mr. Galane: To MCA Artists, stipulated.

The Court: Offer a stipulation.

Mr. Galane: The contract says to MCA Artists, Ltd., as a collection agent.

The Court: May it be stipulated that everything paid under this contract for the benefit of this plaintiff or the La Nouvelle Eve show was paid to the MCA Artists?

Mr. Galane: To MCA Artists, Ltd., as collection agent.

The Court: I assume they take out their 10% and pay other people.

Mr. Foley: I can't stipulate to that, your Honor. I think somewhere along the line a check was given correctly to the La Nouvelle Eve Corporation.

The Court: Let's ask the witness.

Did you ever receive any check directly from the El-Rancho Vegas Hotel in Las Vegas? Did he personally? Did the Hotel pay you personally either by cash or check any money directly?

The Witness: No.

By Mr. Lionel:

Q. Isn't it true that except for money paid to Artists, all the money was paid to MCA?

The Court: Can't it be stipulated?

Mr. Foley: If your Honor please, I think there is some time during this that this was not case.

The Court: I assume the Hotel will be able to show, won't it?

Mr. Foley: I think that is true, in most instances.

The Court: Put the question, if he knows. Ask him. Isn't it true that all of the money, except what was paid to artists, for this show, was paid to MCA, if you know?

[T. 1550, line 21, to 1552, line 14.]

(Improper limiting of cross-examination. Counsel has right to elicit relevant evidence on cross-examination and should not be required to offer direct evidence only. Again Court attempts to have appellants stipulate.)

(By Mr. Lionel)

Q. Was that ten or twelve thousand dollars paid during the first, approximately the first week in April, 1959?

Mr. Galane: Your Honor, we could stipulate $5,000 was given by Mr. Katleman to Mr. Haettel on April 1, 1959; $5,000. was given by Mr. Katleman to Mr. Haettel on April 8, 1959.

The Court: For that purpose? For the purpose of transporting the troupe back to Paris?

Mr. Galane: That we won't stipulate.

The Court: Very well. This witness says—

Mr. Lionel: The witness says it was for that purpose.

By Mr. Lionel:

Q. Now, yesterday you testified—

The Court: Now, we have heard it. Ask him a question.

Mr. Lionel: I think in this case I have to, if your Honor will—

The Court: Direct his attention to the subject matter, but don't attempt to repeat his testimony.

Mr. Lionel: This is a matter—

The Court: That usually always leads to an argument. We have heard the testimony. Now, direct his attention to the testimony yesterday on the subject of so and so without trying to tell him what he testified.

[T. 1553, line 2, to 1554, line 2.] (Improper interjection by appellee's counsel. Court's interruption of cross-examination appears unwarranted.)

By Mr. Lionel:

Q. Is it not true that the $2,000 a week was deducted because the Hotel loaned you the transportation?

The Interpreter: I don't understand the question. Could you kindly read the question?

Mr. Lionel: I will attempt to rephrase it.

The Court: Isn't that covered in the contract, gentlemen?

Mr. Galane: That is my understanding, sir.

The Court: Can't there be a stipulation on it, gentlemen?

Mr. Galane: I will offer a stipulation that the Hotel advanced $17,000 prior to the start of the show on transportation, and there was an amortization taken out every week at the rate of $2,000 per week out of the moneys for the La Nouvelle Eve show, and MCA took it out for that purpose. There is a letter in evidence—I am not sure, but Mr. Foley can help me—David Stein wrote and said, "We are holding the transportation money," a letter dated January 15, 1959, a week before the troupe left Paris.

Is that correct, counsel?

Mr. Foley: I am sure the stipulation is that the money was given to MCA and held by them for Bardy.

Mr. Galane: From the very beginning, and they took it out of the initial money.

Mr. Foley: That was the transportation to come to the United States.

Mr. Lionel: We offer the stipulation that the $2,000 per week was taken out of the $15,000 a week to reimburse for transportation advanced from Paris to the United States.

Mr. Galane: I won't accept—I think you should prove through Mr. Bardy how transportation was arranged, your Honor.

The Court: Whose obligation was it to pay the transportation of the troupe to this country?

Mr. Galane: Mr. Bardy.

The Court: Then the question is, did the Hotel not advance that sum?

Mr. Galane: In January. They took—

The Court: Very well. They advanced the sums to cover the transportation.

Mr. Galane: From Paris to Las Vegas.

The Court: And did they not thereafter, to repay themselves, deduct $2,000. a week?

Mr. Galane: That is correct.

The Court: From what was due to whoever it is, this plaintiff or La Nouvelle Eve Corporation, $2,000 out of those moneys?

Mr. Galane: That part is correct.

The Court: To pay themselves back for their advance?

Mr. Galane: That is correct.

The Court: Is that so stipulated?

Mr. Galane: That isn't what they are talking about.

The Court: I don't know, I am not passing judgment on that.

Mr. Galane: Up to this minute—

The Court: If you will quit making speeches and just reply to my question—

Mr. Galane: I stipulated up to that point.

The Court: Very well, both sides stipulate to that. What else is there about it to cover? What about the return transportation? Who was obligated to pay that?

Mr. Galane: Mr. Bardy.

The Court: Very well. Did he pay it? As I understand, he himself has just testified that he did not pay it, the Hotel did, and then when he says they still owe him $18,600, he deducted the $10,000 for transportation. Now, what else is there to be said about it at this point?

Mr. Lionel: If the Court pleases, I think he said the return transportation was deducted at the rate of $2,000 a week. I would like to try to show—

The Court: That isn't what I understood him to say. You have already stipulated that the Hotel paid $5,000, paid $10,000 during the first ten days, as I recall it, of April, to cover this item.

Mr. Lionel: I am trying to prove that in his own figures he did not allow a credit for the $10,000.

The Court: That is another matter. You can go into that.

By Mr. Lionel:

Q. Now, Mr. Bardy, did you have anything to do with sending your artists back from Las Vegas to Paris after April 7th?

The Interpreter: The date?

The Court: Can't all that be covered by stipulation, that he did not, he wasn't here, he didn't have anything to do with it? Isn't that the stipulation?

Mr. Foley: If the Court please, no. This is a matter at issue. I think the correspondence will show

Mr. Bardy was obligated to do the show and did not do it.

The Court: That is agreed, but the question is, as I understand—of course, it is ambiguous. I don't know what "having anything to do with it" means. Did he take the baggage to the airport, or did he pay, or what? What do you mean by the question? Perhaps we can get a stipulation.

[T. 1555, line 9, to 1559, line 2.]

(Court's interruptions for purpose of obtaining stipulations on matters which counsel had right to elicit by cross examination results in improper limitation of right of cross examination and results in confusion which detracts from cross examination and greatly hampers counsel's efforts)

By Mr. Lionel:

Q. The $2,000 per week that was deducted by the Hotel, was that not deducted for the transportation from Paris to Las Vegas?

The Court: That is already stipulated.

Mr. Lionel: But I have this problem—

The Court: That is already agreed. Now, cover something else.

Mr. Lionel: If your Honor would hear me one moment. When I asked the witness about the $10,000 he said that was paid for by the $2,000 a week taken out of his money. You permitted the witness to testify he had $18,600 coming. [T. 1560, lines 6-16.]

(The limiting and rushing of cross examination was unwarranted particularly in the light of the Court permitting appellee to testify to broad conclusions, without foundation, on direct, with respect to the $18,600. See point VI supra.)

By Mr. Lionel:

Q. Do you know who sent them back, Mr. Bardy?

The Court: That assumes a fact not in evidence, doesn't it?

Mr. Galane: I will stipulate the performers took a trip from Las Vegas to Paris. The plane left July the 5th.

The Court: All of them?

Mr. Galane: That I don't know. They selected those to take a trip July 5th.

The Court: Who is "they"?

Mr. Galane: The El Rancho Vegas and the co-conspirators in this case, alleged co-conspirators. That is our position in this case.

The Court: Put your next question.

Mr. Lionel: I would like to ask the witness once again about that contract part, if I might, your Honor.

The Court: Yes. [T. 1561, line 18, to 1562, line 8.]

(Interjection and speech by appellee's counsel was deliberate misconduct)

By Mr. Lionel:

Q. Mr. Bardy, I show you Plaintiff's Exhibit 29 KP, and ask you if you know where these words "La Nouvelle Eve Corporation, Monte Carlo", came from on that exhibit? A. Because Mr. Conner succeeded in opening an account in the bank. The responsibility is the bank and Mr. Conner.

Q. Were these words placed on this exhibit by a rubber stamp?

The Court: It speaks for itself, doesn't it? [T. 1563, lines 8-16.]

(Unwarranted limitation by Court of cross examination)

Mr. Lionel: I am looking for a certain exhibit, your Honor. I don't have the number.

The Court: Have you about concluded?

Mr. Lionel: I would say I have about 30 or 40 minutes more, your Honor.

The Court: No. It is 1:00 o'clock now. We will take the recess, and boil it down to ten minutes. [T. 1564, line 25, to 1565, line 6.]

(Improper limiting and rushing of cross examination)

(By Mr. Lionel)

Q. Did any of your artists have AGVA contracts?

The Court: When?

Mr. Lionel: In Las Vegas in 1959.

The Court: Can't that be covered by stipulation, gentlemen? Must we take the time to use an interpreter to ask this witness that kind of question?

Mr. Lionel: I don't know that counsel would stipulate, your Honor.

The Court: Well, try and find out. Are you talking?

Mr. Lionel: I offer to stipulate that none of the artists paid by the show had AGVA contracts.

The Court: You mean when they came to America?

Mr. Lionel: At any time between—from the time the show started through April 7, 1959.

The Court: What do you mean by an AGVA contract, that they were not members of that union? Is that what you are saying?

Mr. Lionel: There is a contract form, your Honor, similar to the form of the contract—

The Court: Now, wait a minute. You are testifying.

Mr. Lionel: I am sorry.

The Court: It assumes facts not in evidence. I will sustain the objection upon that ground. You gentlemen should be able to stipulate to that. [T. 1575, line 3, to 1576, line 1.]

(Again the Court limits cross-examination by seeking to have counsel stipulate and then the Court sustains its own objection to a proper question.)

(By Mr. Lionel):

Q. When did you first hear that Aleta Morrison had no contract to stay after April 7, 1959?

The Court: Is that a fact in evidence?

Mr. Lionel: Yes, your Honor.

The Court: Very well. [T. 1578, lines 11-15.]

(Another interruption by the Court although no objection was interposed.)

By Mr. Lionel:

Q. Did you make any attempt yourself, Mr. Bardy, to take care of the situation at the El Rancho during the first week in April?

The Court: Just a moment. What does "take care of the situation" mean?

Mr. Lionel: I will withdraw the question.

The Court: Aren't you about run out by now? You have been cross-examining this witness for four hours or so. I have given you all the latitude I think you need. Haven't you about concluded? [T. 1592, lines 2-11.]

(Rushing of cross-examination.)

APPENDIX B.

Direct Examination of Roy Gerber.

(By Mr. Foley):

Q. What is your work with that corporation? A. I am in charge of their live television department, West Coast.

The Court: Is that part of MCA?

The Witness: No, sir.

The Court: You are no longer connected with that group?

The Witness: No, sir.

The Court: How long has it been since you ceased your connection with MCA?

The Witness: Last July 23rd, sir.

By Mr. Foley:

Q. What is this new organization? A. This is an organization that has been in business for many years, General Artist Corporation.

The Court: General Artist Corporation? It is new to me. [T. 2352, lines 1-18.]

Q. Will you tell us what your initial contact was with regard to the La Nouvelle Eve show? A. The initial contact we received in the form of information, phone calls, notifications through the office of one of our senior vice presidents in New York, seeing a show in Paris that he thought was a most excellent show and something he thought would be a suitable show for us to book at various places around the United States, inside the United States, outside of the United States.

The Court: You mean that was before Stein had signed Bardy up in Paris?

The Witness: I don't know the exact date, sir. I should imagine that it followed David Stein's signing of—

The Court: Well, after the show came to Las Vegas you were representing MCA?

The Witness: I was.

The Court: You were representing the show?

The Witness: I was instrumental in bringing the show to Las Vegas, yes, sir.

The Court: You worked through Stein?

The Witness: Yes, sir.

The Court: And you were interested in lining it up for Katleman's hotel; is that it?

The Witness: Yes, sir.

The Court: So then the show came over?

The Witness: Yes.

The Court: In January of 1959?

The Witness: Yes, sir.

The Court: Can't we start there?

Mr. Foley: If your Honor please, there is certain background foundation material I think is important to the case. There are considerable efforts and transactions MCA undertook.

The Court: I am confident that that is so. You don't just call up on the phone and say, "Bring your show on over," or something like that. But I didn't assume it was in issue here.

Mr. Foley: That is correct, your Honor.

The Court: I assume it is conceded that there was a great deal of work done; that no one is questioning MCA—

Mr. Galane: We concede that up to April the 1st, 1959 MCA did its job. The complaint says that starting—

The Court: All right. Do you accept that stipulation?

Mr. Foley: Well, Mr. Bardy said from the witness stand, "What did they do to earn their $1500?"

The Court: Counsel is willing to stipulate that MCA performed under its contract everything called upon them substantially up until April 1st—

Mr. Galane: Up until March 30, 1959.

The Court: Up to March 30, 1959. Will you accept the stipulation?

Mr. Foley: Yes, your Honor. There is certain background material necessary to go into. We can cut it short.

The Court: I don't want to preclude you. I was attempting to eliminate matters not in dispute.

By Mr. Foley:

Q. After the initial contact and the signing of the La Nouvelle Eve Revue to an agency contract, what did you do? A. I attempted to sell it in various places, various establishments throughout Las Vegas.

Q. How many establishments. A. Oh, I would say four or five might have been available.

The Court: An establishment in Las Vegas is a hotel?

The Witness: Yes, sir.

The Court: Is that the terminology? [T. 2353, line 10, to 2356, line 3.]

(By Mr. Foley):

Q. What did you do after Mr. Bardy arrived? A. We took Mr. Bardy to the El Rancho where Mr. Katleman had invited him. Well, we made a dinner date, and when I came back unfortunately Mr. Bardy couldn't go out with us. We were going out and see the various shows in town to let him see what Las Vegas was. I

think this was his first trip. I believe it was his first trip. To let him see the shows, the attractions there. Unfortunately we were delayed in the departure because we lost Mr. Bardy's pants.

The Court: Don't go into all that. He came over to look Las Vegas over, and I assume he saw it, didn't he?

The Witness: Well, we—

The Court: He may not have seen all of it, but he saw some of it, all he wanted to?

The Witness: Yes, he did, sir.

The Court: Then he went back to Paris?

Mr. Foley: If your Honor please, there are some important things in this area I would like to cover.

The Court: Very well.

The Witness: We missed the dinner show that evening. We were riding around during the evening showing him the various hotels. The second night we went out we went to the Lido show at the Stardust, and it was following that show—the table comprised of myself, Miss Pivornick, Monsieur Bardy and Jerry Nolan—it was following that show we went back to the El Rancho, and Mr. Bardy, through Miss Pivornick, advised me that he was very unhappy.

Mr. Galane: If your Honor please, there is a document in evidence, and we will stipulate that MCA has a memorandum that Mr. Bardy was very upset that he could not be as good as the Lido show, and it is an MCA memo. If they will wait a minute—

Mr. Foley: We don't need the memo.

Mr. Galane: I will stipulate when Mr. Bardy first came to Las Vegas and saw the Lido he was very concerned that he would not have the ability to produce a

show competitive with the Lido de Paris, and, I think, in fact, he wanted to back off the deal.

The Court: You mean the facilities in Las Vegas?

Mr. Galane: Yes.

The Court: You mean the facilities?

Mr. Galane: Under the facilities at the El Rancho Vegas Hotel.

Mr. Foley: That is not the question. I would like to proceed with the witness uninterrupted.

The Court: Proceed. [T. 2357, line 14, to 2359, line 10.]

By Mr. Foley:

Q. Mr. Gerber, would you state what you did with reference to the specialty acts after the discussions?

The Court: Now, is that necessary?

Mr. Foley: It is important to the case, yes, your Honor.

The Court: No one disputed that MCA did their work as far as earning their commissions up to the point of the alleged conspiracy is concerned.

Mr. Foley: I agree, your Honor, but there was a specialty act changed.

The Court: Very well.

Mr. Foley: As of April 8th, your Honor, and this is foundation for that. [T. 2434, lines 2-14.]

(By Mr. Foley)

Q. What did MCA do with it? A. Advanced it to Icelandic.

The Court: Isn't that the sum that was supposed to be amortized at $2,000 a week?

May there be a stipulation as to that?

Mr. Galane: Yes, we had stipulated to that earlier in the trial.

Mr. Lionel: I think the amount was $19,000, your Honor, and I would stipulate to that amount.

Mr. Galane: That is what David Stein's letter to Mr. Bardy says, is $19,000. I think counsel for the Hotel is correct. That is Exhibit 106.

The Court: Well, that $19,000 was for the round trip, wasn't it?

Mr. Galane: Yes, or at least on account of the round trip.

The Court: Well, Mr. Foley just read the letter from Icelandic, Exhibit M—

Mr. Foley: MS, your Honor.

The Court: —MS, to that same effect, as I recall the figures. But the figure of $12,000, whatever it is, is included in the $19,000. The figure of $12,000 was for the coming over trip; is that correct, from Paris?

Mr. Foley: Yes, your Honor.

The Court: And the return was estimated at what, at seven thousand some odd dollars?

Mr. Foley: Originally the point being here that there is some additional expense, and the total bill for transportation was $21,442.32, according to Icelandic.

The Court: Very well. Of which twelve—whatever that figure is—twelve thousand odd for the expense of the transportation coming over is included in the total amount that was to be amortized at the rate of $2,000 a week for the entire engagement.

Mr. Foley: For the initial run of the show, your Honor.

Mr. Lionel: No, your Honor.

The Court: Initial run of how many weeks?

Mr. Foley: Ten weeks.

The Court: Well, that would be two thousand a week for ten weeks.

Mr. Foley: I think actually it was mentioned—the $12,000 was because of a feature in the initial contract whereby Mr. Katleman, if he chose to, could cancel at the end of six weeks. If he did not choose to cancel, the show would run an additional four weeks for a period of ten.

The Court: Let's get the transportation straightened out.

Mr. Galane: Your Honor, it was $19,000.00.

The Court: That is what Icelandic estimated the round trip to be; is that correct?

Mr. Foley: Yes.

The Court: Now, of which $12,000 was incurred coming over; is that it?

Mr. Galane: That is correct.

The Court: Coming to Las Vegas from France?

Mr. Galane: That is correct.

The Court: That was to be along with the return engagement amortized by deducting from Bardy's share, Bardy's payment each week, $2,000?

Mr. Galane: That is correct. May I also add, according to this letter, the Hotel posted $19,000 with MCA. They escrowed it.

Mr. Foley: I don't think that is correct. I have other exhibits.

The Court: Why go into all that? If we can stipulate to it, let's get it down where we can understand it. You don't have to prove it. That is the purpose of a stipulation.

Mr. Lionel: Except from the defendants I represent, your Honor, there is an important point involved that

I will attempt to show on cross examination of this witness.

The Court: May it be stipulated here as I have stated here that that was the arrangement?

Mr. Galane: Plaintiff so stipulates.

The Court: When I say, "Paid to Bardy," paid to whoever is entitled to the money under the contract.

Mr. Lionel: Yes, sir, your Honor. If I may clarify that stipulation, your Honor. May I say that the Hotel advanced $19,000, actually, and gave it to MCA to handle with respect to the transportation, and that amount was to be amortized by the show over the period that the show ran.

Mr. Foley: That is incorrect. I will not accept that. I believe it is incorrect.

The Court: Well, probably the Hotel gave it to MCA, MCA gave it to the union.

Mr. Galane: If your Honor please, the $10,000 to the union had nothing to do with this.

The Court: I am not talking about the $10,000 to the union.

Mr. Galane: We will accept the stipulation that the Hotel gave $19,000, which, according to David Stein, was held by MCA for transportation for the benefit of Mr. Bardy.

The Witness: May I say something?

Mr. Foley: That is not correct. That was Mr. Stein's position originally.

By Mr. Foley:

Q. How much was paid by Mr. Katleman towards the transportation money coming over? A. $12,000.

Q. Was any amount— A. Twelve thousand, round figures. $12,000, sir.

The Court: Even money?

The Witness: Even money.

By Mr. Foley:

Q. And that is the $12,000 mentioned in the exhibits that I had read? A. Yes, sir.

The Court: And that $12,000 was taken out at the rate of $2,000 a week during the first six weeks of the run?

The Witness: Correct, sir.

The Court: That was the initial engagement?

The Witness: Yes, sir.

The Court: From the end of January until about the end of March?

The Witness: No, the beginning of March, I believe it would be, sir.

The Court: Beginning of March?

The Witness: Yes, sir.

The Court: Then the option was exercised for—

The Witness: It was a reverse option. It was a situation of the show being booked for ten weeks. If the show were to be cut back for six weeks, there was an additional payment of $10,000 to be made to Mr. Bardy so that would amortize his expense of transportation.

The Court: The six weeks would cover the 12,000?

The Witness: That is right.

The Court: And that was taken out?

The Witness: Yes, sir.

The Court: So we can forget about that as far as the accounting is concerned, can't we?

Mr. Galane: Yes. Plaintiff agrees to the amortization rate.

Mr. Foley: I would like to have Mr. Gerber now read what is in evidence as Plaintiff's 98.

The Court: Well, now, on this going home business, the difference between the 12,000 and the 19,000 odd dollars, what became of that $7,000?

Mr. Foley: Well, your Honor, according to this exhibit, the $7,000 became an additional amount because there was additional transportation arranged according to this exhibit, so rather than the nineteen thousand, the total cost of transportation and transporting of costumes became $21,442.32.

The Court: That was the round trip?

Mr. Foley: The total round trip.

The Court: All right. We have 12,000 put up for the coming over. Now, what about this statement that nineteen odd thousand dollars was put up?

Mr. Foley: That is revised by this. That is the total cost. The nineteen thousand, if the Court please, was apparently just the transportation of the troupe itself, round trip.

The Court: Very well. Was nineteen odd thousand dollars put up by the Hotel?

Mr. Foley: No. Originally twelve.

The Court: And that is all?

Mr. Foley: That is all.

The Court: So all the Hotel ever put up was twelve to bring them over, which was amortized out?

Mr. Foley: That is correct.

The Court: And the two fives, totalling ten, to send them back?

Mr. Foley: Yes.

The Court: Is that right?

Mr. Foley: I understand now.

The Court: Is that agreed?

Mr. Lionel: Stipulated.

Mr. Galane: So stipulated.

The Court: And the only part that was amortized out was the twelve—twelve thousand; is that correct?

Mr. Lionel: Yes, your Honor.

Mr. Galane: So stipulated.

Mr. Foley: Yes, your Honor.

The Court: So the way the round trip stands, the Hotel advanced $10,000 to the union allegedly for that, according to the evidence.

Now, does Mr. Bardy contend that he advanced some, too?

Mr. Galane: Yes, sir, four thousand is his out-of-pocket loss, from my information.

The Court: You mean the airline was overpaid?

Mr. Galane: No, the airline had already been paid by him.

The Court: You mean the airline was overpaid?

Mr. Galane: Maybe. I can only speak for Mr. Bardy's out-of-pocket disbursements.

The Court: You must have looked into this. Let's get it straight. Was the airline overpaid?

Mr. Galane: This I don't know, sir.

The Court: Has anyone looked into it?

Mr. Lionel: I have no evidence otherwise.

The Court: It is estimated to be twenty-two thousand odd dollars, the round trip?

Mr. Foley: Not quite that. It was twenty-one thousand four hundred and forty-two dollars—

The Court: Well, twenty-one thousand odd dollars. Now, the Hotel put up twelve and then the ten, which would be twenty-two. Do you expect to offer evidence that Mr. Bardy put up something too?

Mr. Galane: Yes, sir.

The Court: The union testified that all of the ten went to the Icelandic.

Mr. Galane: Yes, sir.

The Court: Isn't that the testimony of Mr. Haettel?

Mr. Galane: I think they said all but about $900.00, which they still have in the bank.

The Witness: This cost was reduced in some way, because not everybody that went over with the troupe ever went back.

Mr. Galane: If your Honor please, it should also be pointed out that they didn't go back in one trip. Ten were cut out of the cast.

The Court: That appears in the evidence.

Mr. Galane: I think that affects the cost to some extent.

The Court: In any event, the Hotel put up $22,-000 for transportation and got back twelve of it out of the amortization, and of the other ten, 9,900 of it the union says was actualy expended for transportation, is that correct?

Mr. Lionel: I think it was about 9100 of the ten.

The Court: Very well, approximately 9100. That is it, $900 the union still has of the money?

Mr. Bergin: Approximately that amount, your Honor.

The Court: Can't we find out exactly? You aren"t going to ask this jury to render a verdict for approximately so much money. I can't render a judgment for approximately so much money; have to be a definite amount.

Mr. Bergin: But the union isn't a defendant in this matter, your Honor. That would be something for the plaintiff and the union to settle, not any of the defendants herein.

Mr. Galane: If your Honor please, our position is the money didn't get to Mr. Bardy; the Hotel is indebted on the contract.

The Court: That will be the plaintiff's position. We should know the precise amount that was expended. Can't we find that out? It seems to me you could stipulate to those things.

Proceed. [T. 2444, line 8, to 2453, line 25.]

By Mr. Foley:

Q. Mr. Gerber, then when did the rehearsals start? A. Rehearsals started the next afternoon. The troupe arrived quite late at night, and it was decided that the rehearsals would not start until approximately two o'clock the next afternoon.

The Court: Mr. Gerber, just answer the question and if you feel it has to be explained—I imagine you could talk for a week on all the things that happened in connection with that entire matter, but let's not do it unless it is in controversy here.

The Witness: I thought I did answer it.

The Court: Well, then quit. You answered the question all right, but you keep going on and on and on, and it is all very interesting, but I don't think it is in controversy here.

By Mr. Foley:

Q. During the rehearsal, were there any changes made in the manner of the presentation of the show? [T. 2465, line 10, to 2466, line 2.]

By Mr. Foley:

Q. Were changes made in the revue during the rehearsal? A. Yes. They were—

The Court: You weren't asked what they were.

The Witness: Yes, sir. [T. 2469, lines 6-10.]

(By Mr. Foley):

Q. Was there any change in the billing?

The Court: In the advertising? [T. 2473, lines 2-3.]

Q. Was there a subsequent money bill sent for that?

The Court: By whom? [T. 2473, lines 18-20.]

A. There were several conversations that I had with Mr. Haettel with regard to the AGVA thinking on this situation. After many of these conversations and similar conversations resulting after several conversations with Mr. Bardy and Mr. Holmes, I recommended and advised that they sit down and write a letter to AGVA in New York stating their case, stating that over the period of years Mr. Bardy had hired many American acts for appearances at La Nouvelle Eve and—

The Court: You mean in Paris?

The Witness: In Paris, yes, sir. I believe the term "reciprocity"—

By Mr. Foley:

Q. Reciprocity? A. Yes, came up in the conversation, and it was decided that this would be a good word to use in the letter to AGVA. I had hoped that in this manner possibly something that had not previously been called to Mr. Bright's attention would be brought out. The intent of which was to obtain permission and therefore be able to continue booking the show.

The Court: You mean to have it on tour? Is that what you mean?

The Witness: Yes, sir. [T. 2481, line 3, to 2482, line 2.]

Q. I believe those are shown in the exhibits which I have just shown to the jury, but would you state what particular contacts you made?

Mr. Galane: Objected to, if your Honor please, unless counsel makes it clear. He is talking about firm bookings.

Mr. Foley: I am not talking about firm bookings.

Mr. Galane: That is the question.

Mr. Foley: The question is what contacts were made.

The Court: What efforts were made to book the show on tours; is that it?

Mr. Foley: That is correct, your Honor.

The Court: Just tell us briefly; you tried to get it in New York or wherever you did. Don't tell us all the details. You tried to get bookings in the following cities.

The Witness: I can't answer the question briefly, your Honor.

The Court: You don't have to tell what you did. Did you try to get it in Miami?

The Witness: Miami.

The Court: Chicago?

The Witness: Yes, sir.

The Court: Cincinnati?

The Witness: Yes, sir.

The Court: New York?

The Witness: Yes, sir.

The Court: Philadelphia?

The Witness: Yes, sir.

The Court: And numerous other places?

The Witness: Yes, sir.

The Court: You have answered it.

What is the next question? [T. 2482, line 13, to 2483, line 19.]

The Court: That portion of the answer will be stricken.

The Witness: The discussion that took place with Mr. Bardy at that point, I believe—I am not sure, I would have to check the dates—that we had not as yet received an answer from AGVA, and in my conversations with Mr. Bardy it was discussed that it would be to his advantage if we were to prolong the engagement at the El Rancho and, therefore, possibly wait until the answer had arrived from AGVA.

The Court: Exhibit 472 states that the first two shows nightly shall be abbreviated versions of the present program and the third show shall be equal.

The Witness: That is right.

Mr. Galane: If your Honor please, isn't it—I may be wrong—yes, forgive the interruption. That is the contract.

The Witness: The reason for that is, as I explained, there was a star Mr. Katleman had not been able to push back.

The Court: What do you mean "push back"? [T. 2487, line 10, to 2488, line 4.]

The Court: This letter was written to whom by whom from where?

The Witness: I said that, sir; from Rene Bardy to me in Las Vegas from Las Vegas.

The Court: And the date of it?

The Witness: Dated March the 6th.

The Court: While Mr. Bardy was in Las Vegas?

The Witness: Yes, sir.

The Court: Did he hand it to you? [T. 2493, lines 3-11.]

The Witness: Yes, there was conversation which brought forth Mr. Bardy's statement in his letter. I told him that if—

The Court: Now, you don't have to go into that. You weren't asked that.

Mr. Foley: I would like to have the conversation. your Honor.

The Witness: I told—

The Court: The plaintiff wrote the letter, didn't he?

Mr. Foley: What performers was he talking about? That is what I want to show by this means.

Mr. Galane: If your Honor—

The Court: All of them, wasn't he?

Mr. Foley: He certainly did.

The Court: Does not the letter speak for itself?

Mr. Foley: Your Honor, here is the problem—

The Court: You don't need to argue the case. If you will finish the evidence, I will let you gentlemen argue this case. I have never seen lawyers more anxious than you are. Let's finish the evidence so you can get to it.

Mr. Foley: I am trying to show knowledge of the plaintiff of certain things which he claims he didn't have knowledge of, and he blames us for not giving him knowledge.

The Court: Has he so testified?

Mr. Foley: Yes. He testified in this case he didn't know about the absence of these performers.

The Court: You haven't come up to that. You are at March 6th.

Mr. Foley: This is when Mr. Gerber told him about it.

The Court: If you move up to April—

Mr. Foley: It was March 6th when Mr. Gerber told him these things.

The Court: Very well. He told the plaintiff. Lay the foundation. Ask him what he told him about the performers.

Mr. Foley: That is the question. [T. 2498, line 1, to 2499, line 12.]

(By Mr. Foley):

Q. Any other conversation—

The Court: Did he tell you he was doing that?

The Witness: He said he was going on.

Q. He told you he, a man, was going to sing, "Oh, My Man I Love You So."?

The Witness: He didn't say that; he said he was going to sing her numbers. That was one of the numbers.

The Court: Do you want the jury to understand he was going to sing "Oh, My Man, I Love You So"?

The Witness: At that point anything was possible, sir. [T. 2517, lines 6-16.]

(By Mr. Foley):

A. The series of meetings brought forth the fact that the show that was now appearing at the El Rancho, which was Jack Wallace and a girl singer, was causing quite a bit of loss of business. Mr. Katleman had been bitterly complaining about that to me for that three-day period we were discussing. He implied to me that if I could work out a deal whereby the cost of the continuation of the show could be reduced so he might possibly recoup some of his loss now going on, he might be willing to do so.

The Court: You call it Jeff Wallace?

The Witness: Jack Wallace.

The Court: I thought Lewis went in there.

The Witness: No, Jack Wallace was the record act, sir.

The Court: Didn't Lewis go in there on the night of the 8th?

The Witness: To tell you the truth, I don't know, sir. I was backstage.

Mr. Foley: Maybe I can clear this up with a leading question.

By Mr. Foley:

Q. Was it Monique Van Vooren? A. Yes, sir.

The Court: Wasn't Lewis there?

The Witness: I honestly could not say that he was, sir.

The Court: Didn't your company represent the show that went on that night?

The Witness: No, sir.

By Mr. Foley:

Q. Who represented Monique Van Vooren?

The Court: It wasn't MCA?

The Witness: Jack Wallace was.

The Court: So you represented a part of the show?

The Witness: I represented Jack Wallace.

The Court: These performers were members of this same union that Mr. Haettel represented? [T. 2529, line 1, to 2530, line 14.]

By Mr. Foley:

Q. Talk a little louder, if you would, please.

The Court: Don't talk to me. Mr. Haettel wasn't concerned about it, was he?

The Witness: He was most concerned.

The Court: His members were working, whoever was on the stage?

The Witness: I think whether his members were working or not was not the matter of prime concern.

The Court: Was he arguing, trying to get the La Nouvelle Eve on there?

The Witness: Yes, sir.

The Court: Were the other members of the union trying to go on, the substitute show? Did they hear him arguing to try and keep them out of work?

The Witness: No, sir, I don't believe that they were present at the point of argument. Miss Van Vooren or—

The Court: You said there was a great deal of panic?

The Witness: There was, yes, sir. This was 8:15, and at 8:15 the show started, people on stage, people coming on—

The Court: As far as you know, did the members of the union who were waiting to substitute to make some money hear Haettel arguing for somebody else to go on and make some money?

The Witness: I couldn't make that statement. No, sir, I couldn't.

The Court: So, in other words, the people who were waiting to go on, the show that finally went on, didn't hear all this panic, then?

The Witness: They might have, and they might not have. I don't know. I couldn't say whether they did or not.

One of the members of the group who was booked there with Jack Wallace probably was standing around on that side of the stage.

The Court: How did you put this man Wallace on?

The Witness: This man Wallace has done an act by himself, just as George Matson.

The Court: But he was part of the La Nouvelle Eve Show?

The Witness: No, he wasn't sir; he was under contract to the El Rancho Vegas as were the other specialty acts.

The Court: He was under contract to MCA?

The Witness: No, I am saying an employment contract.

The Court: But you represent him?

The Witness: Yes, sir.

The Court: And you put him in the La Nouvelle Eve show? [T. 2531, line 1, to 2533, line 16.]

(By Mr. Foley):

The Witness: MCA represented Francis Brunn, Andre Phillipe, MCA represented Jack Wallace. Those were the three specialty acts MCA represented. I drew the contracts for them.

The Court: You say that they were employed directly by the Hotel? [T. 2535, lines 7-12.]

(By Mr. Foley):

Q. When the La Nouvelle Eve did not work on April 8th, Jack Wallace performed in the substitute show?

A. He had done nothing wrong. He had a job to do, and he did it.

The Court: But it was your position that no one had done anything wrong; right?

The Witness: Right.

The Court: You were representing all these people?

The Witness: Yes. He had a contract with the Hotel to perform.

The Court: You wanted this show to go on?

The Witness: Yes, sir. But how could I say to him, "You cannot go on"? He had a contract to perform. He was performing at the Hotel for the Hotel.

By Mr. Foley:

Q. HE was under contract with the Hotel? A. Yes, sir.

Q. Now—

The Court: What about the other specialty acts? Weren't they under contract? [T. 2536, line 10, to 2537, line 4.]

A. The proposition was finally made to Mr. Holmes and to Mr. Regis that Mr. Katleman would pay $2,000 per week to Mr. Bardy, and that is what Mr.—

The Court: And the show would go on without these two girls?

The Witness: Yes, sir.

The Court: Janine Caire and Aleta Morrison? [T. 2538, line 25, to 2539, line 6.]

Mr. Foley: May I read these exhibits, your Honor?

The Court: Who was to provide these replacements under this new $2,000 Bardy arrangement?

The Witness: Well, under the contract—

The Court: No, no. I didn't ask you that. I asked you who was to provide—you said they were making a new deal now.

The Witness: Yes, sir.

The Court: Well, did I understand you to say that Katleman said, "Well, if Bardy will accept $2,000 instead of five the show could go on;" is that right?

The Witness: That's right.

The Court: All right. Who was to provide these replacements? You say it was to go on without Janine Caire, and what is the name, Aleta Morrison?

The Witness: Aleta Morrison.

The Court: So there had to be two substitutes, replacements, for them. Who was to provide them under the new arrangement?

The Witness: Under the new arrangement Mr. Bardy was just receiving a fee; everyone else was now under contract to the El Rancho.

The Court: That isn't the question. My question is who was going to pick these replacements, Katleman or Bardy?

The Witness: It was not Bardy at this point; it was either Katleman or Charley Henchis, or if I knew of someone who would fit the show.

The Court: In other words, you had no agreement about that?

The Witness: No. They would be replaced.

The Court: By whomever?

The Witness: The best we could find.

The Court: Whoever could find them?

The Witness: Anybody involved.

The Court: MCA?

The Witness: If I could find them it would be my booking, I would make a sale. [T. 2539, line 22, to 2541, line 8.]

(By Mr. Foley)

Q. Well you tell us when you hired him and for what period and for what purpose? A. I don't remember the exact date when he was hired. I know that the Charley Ballet opened as part of a show at the El Rancho. The Charley Ballet at that point was a series of three production numbers.

The Court: Was MCA representing it? [T. 2550, line 23, to 2551, line 4.]

The Court: Let's ask the witness. He ought to know.

Was anything ever paid Bardy under that so-called extension arrangement?

The Witness: I think it was being paid to AGVA. I don't know exactly.

The Court: No, no, I am talking about anything for Bardy.

The Witness: I don't know. At that point—

The Court: You were representing him. Did you collect any of the money? Let's get at it this way: From the time the show opened until this trouble came up on April 8th, you had collected all—that is, MCA had collected—all the money that was paid for this show; is that right?

The Witness: Yes, sir.

The Court: That is, paid to Bardy or—

The Witness: The check was made payable to MCA.

The Court: Made payable to MCA. So MCA took their 10% out?

The Witness: Right.

The Court: And, I assume, sent the rest to Bardy?

The Witness: No, sir. All I did each week was endorse the check, and Peter Holmes would endorse the check and they would make their payroll.

The Court: How did you get your 10%?

The Witness: It was a separate check each week. The 10% was a separate check.

The Court: From whom?

The Witness: From El Rancho.

The Court: In other words, El Rancho paid you direct, the Hotel paid you direct?

The Witness: They deducted the commission from the figure and paid me direct, yes, sir.

The Court: So you got your 10% on that?

The Witness: Yes, sir.

The Court: Now, did you ever get any more 10% out of this deal?

The Witness: No. As of April 15th, which I believe—

The Court: I am talking about after April 7th.

The Witness: April 7th there was no—

The Court: You see, this new contract was supposed to start April 8th, wasn't it?

The Witness: Yes, sir.

The Court: Where Bardy was to get $5,000 a week?

The Witness: Yes, sir.

The Court: Were you to get 10% of that?

The Witness: No, sir.

The Court: Weren't you?

The Witness: No, sir.

The Court: Oh, no, I see, the commission was to be paid by the Hotel?

The Witness: Yes, sir, but not on the 5,000.

The Court: Whatever your commission was on that. Did you have a commission of so much?

The Witness: Yes, a commission on the cost of the show excluding the 5,000 figure.

The Court: All right. Now, my question is, did you ever get anything further from the hotel, MCA get anything for anything that transpired after April 7th?

The Witness: As of the week starting April 15th we received—

The Court: I mean, did you receive anything—

The Witness: Yes, MCA received a commission through April 7th.

The Court: Yes. Now—

The Witness: The new contract—

The Court: That was handled in the same way you have described?

The Witness: Yes, sir.

The Court: The Hotel paid MCA direct, you took the check and gave it to Holmes, Holmes banked it, and so forth?

The Witness: Right.

The Court: Now, after April 7th, how did MCA come out?

The Witness: There was no payroll the following week. The only money that exchanged hands the following week was the half payment.

The Court: Then beginning April 15th there was a show?

The Witness: Yes, sir.

The Court: And what was that show?

The Witness: That show was the 20 some odd people.

The Court: What was it called—

The Witness: It was still—

The Court: La Nouvelle Eve?

The Witness: La Nouvelle Eve.

The Court: How long did it run, June 2nd?

The Witness: It ran through June 2nd.

The Court: Did MCA get from the Hotel 10%.

The Witness: No, sir, they received 10% of the cost—the amount is approximately $674. a week.

The Court: Well, my point is, after April 7th there was no check for Bardy any more, no check which you gave to Holmes to deposit in the bank account; is that it?

The Witness: There was—I believe there are some papers somewhere—

The Court: Can't you agree on this, gentlemen?

Mr. Galane: To my knowledge, your Honor, Mr. Bardy never got a cent after April—

Mr. Foley: I think this is a matter of Mr. Frank Watts' records, perhaps. I really don't know, because at this point the other man came in shortly afterwards, Mr. Broder, and was concerned about the accounting. Mr. Gerber simply went ahead—

The Court: Can we agree that after April 7th was there any money paid directly to Bardy or Holmes?

Mr. Galane: Your Honor—

The Court: You were handling the checks?

The Witness: I know it.

The Court: Did you handle any more checks that went to Holmes?

The Witness: Yes, I did. They were payroll checks paid in the same manner as the show had been done previously up to that point. The check would come through for X amount of dollars, certain charges would be made against those checks, room, food—

The Court: Who handled that?

The Witness: I would handle it, endorse it. A check would be deposited by Holmes and Conners and the payroll handled—

The Court: Do you know whether Bardy got anything?

The Witness: No. What happens, every Wednesday or Tuesday night Harold Conners would meet with Watts and they would establish what the payroll was that week, the veracity and amount of check, I assume, to be correct, with Mr. Conners going over it. All I would do was take the check, endorse it, and they would carry on as they always had. There were always deductions against the check.

The Court: And you got your 10%?

The Witness: No, I did not, sir. I only received commission on the amount of cost of the show.

The Court: That is what I am talking about.

The Witness: Well, in other words, the cost of the performers working there at the time; no commission on the $2,000 whatsoever.

The Court: Well, was the $2,000 ever paid? That is what I am getting at.

The Witness: I don't know.

The Court: Did you ever hear it was paid?

The Witness: Whether it was paid in the check or not, I cannot establish.

The Court: But you looked it over, and that was part of your job?

The Witness: No. Mr. Conners would work over the work sheet with Mr. Watts at the Hotel.

The Court: You were representing MCA at that time?

The Witness: Yes, sir.

The Court: Did you think you were still representing Bardy?

The Witness: Yes, sir.

The Court: Did you ever ask if there was anything in that check for him?

The Witness: There was nothing to lead me to believe there wasn't. If there were deductions being made, I assumed they would be straightened out by Watts and Mr. Conners.

The Court: Well, I assume it will come out sooner or later. [T. 2553, line 16, to 2559, line 23.]

APPENDIX. C.

Plaintiff's Exhibits

No.	Identified At Page No.*	Offered At Page No.	Received At Page No.	Rejected**
13				
14		71	74	
16		1014	1014	
18		1014	1015	
20		1015	1015	
21		74	75	
22		1015	1015	
26		1372	1372	
28		1015	1016	
29		1016	1016	
30		1653	1653	
32		1016	1016	
44		1104	1104	
45		1017	1017	
47		75	75	
52		75	75	
56		178	179	
62		1017	1017	
57		1032	1032	
66		1017	1018	
68		1652	1652	
70		75	76	
72		76	76	
73		100	102	
75		106	107	

*Many of the exhibits were not identified, and were marked prior to trial and court sessions.

**Only admitted exhibits are part of the record.

No.	Identified At Page No.	Offered At Page No.	Received At Page No.	Rejected
75 A 1 through 75 A 18		181	181	
76		108	109	
82		109	109	
83		109	110	
86		110	110	
86 A		110	112	
87		112	113	
88		1644	1645	
89		113	113	
90		125	125	
90 A		1260	1261	
90 B		1262	1262	
91		1031	1031	
93		1165	1165	
94		76	77	
95		126	126	
96		879	879	
97		138	139	
98		126	126	
105		703	706	
100		1969	1971	
101		1969	1971	
102		1969	1971	
109		177	178	
129		989	919	
141 A		494	495	
141 B		494	495	
141 C		494	495	
150		184	184	

No.	Identified At Page No.	Offered At Page No.	Received At Page No.	Rejected
151		187	187	
152		2701	2702	
153		187	188	
156		1167	1168	
157			1845	
159		188	188	
162		188	189	
164		189	189	
165		189	189	
166		190	190	
167		190	190	
170		196	198	
179		1858	1858	
183		1293	1294	
185		1281	1283	
186		1368	1370	
191		1368	1370	
193		1368	1370	
196		1368	1370	
198		1373	1373	
200		1314	1315	
201		1314	1315	
205		1368	1370	
207		1368	1370	
209			1206	
211			1206	
212			1206	
213			1206	
214			1206	
215		507	507	

No.	Identified At Page No.	Offered At Page No.	Received At Page No.	Rejected
216			1206	
217			1206	
219		1196	1197	
220			1206	
222		375	375	
225		382	383	
226		383	383	
229			1206	
231			1206	
232			1206	
234			1206	
235			1206	
238		385	385	
239		383	384	
240		384	384	
242			1206	
243		440	440	
244			1206	
247		1222	1222	
250		394	395	
251		394	395	
252		394	395	
253		394	395	
254		394	396	
255		394	396	
256		394	396	
260			1206	
261		394	396	
262		394	396	
264		438	438	

No.	Identified At Page No.	Offered At Page No.	Received At Page No.	Rejected
265			1206	
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270		441	441	
271		441	441	
272			1206	
273			1206	
275		910	911	
282		457	458	
284			1206	
292		1368	1370	
294		739	740	
295		1368	1370	
298		1231	1232	
304		1370	1370	
305		1231	1232	
306			1548	
309		1371	1371	
324		532	533	
326		1370	1370	
327		1370	1370	
333		532	533	
334		548	549	
335		555	555	
335 A		545	546	
336		1372	1372	
342		532	533	
343		1327	1328	
347 A		544	545	
364		2699	2700	
368 A		546	547	
378		1373	1373	

No.	Identified At Page No.	Offered At Page No.	Received At Page No.	Rejected
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406		767	767	
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419		1646	1648	
421		1646	1647	
426		1646	1647	
438		1646	1647	
439		1646	1647	
447	83			
448		128	128	
449		128	129	
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462		135	136	
463		136	136	
464		136	136	
465		136	137	
466		138	138	
467	211			

No.	Identified At Page No.	Offered At Page No.	Received At Page No.	Rejected
468		234	235	
469		235	236	
470		236	236	
471		236	237	
472		238	238	
472 A		1263	1264	
473		238	238	
474		357	358	
475		358	358	
476		365	366	
477		375	376	
478		389	389	
479	392			
480	379			
481 A	412			
481 B	412			
481 C	409			
482		438	438	
483		443	444	
484		444	445	
485	460			
486	464			
487		488	489	
488		508	510	
489		605	606	
490		609	610	
491		611	611	
492		611	612	
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494		612	613	

No.	Identified At Page No.	Offered At Page No.	Received At Page No.	Rejected
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503	634			
504		670	671	
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510		687	687	
511		720	720	
512		511	512	
513	728			
514	728	738	738	
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519	731	738	738	
520	731	738	738	
521	732	738	738	
522	732	738	738	
523	732	738	738	
524	732	738	738	
525	732	738	738	

No.	Identified At Page No.	Offered At Page No.	Received At Page No.	Rejected
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527	733	738	738	
528	733	738	738	
529	735	738	738	
530	735	738	738	
531	828	829	830	
532	857	859	859	
533	857	859	859	
534	887			
535	916			
536	1020			
537	1020			
538	1021			
539	1021			
540	1033			
541	1035			
542	1049			
543	1131			
544	1177	1178	1182	
545	1178	1178	1182	
546	1432			
547		1654	1655	
548		1814	1815	
549	1850			
550	2163			
551	2338			
552	2416			
553 A	2583			
553 B	2583			
553 C	2583			

No.	Identified At Page No.	Offered At Page No.	Received At Page No.	Rejected
554	2609			
555		2615	2616	
556		2642	2642	
557		2675	2675	
558	2682			
559		2708	2708	
560		2708	2708	
561		2718	2719	
	Defendant Hotel's Exhibits			
A		1447	1448	
B		1458	1458	
C		1470	1470	
D		1500	1500	
H		1536	1537	
I		1584	1585	
J		1990	1995	
K		2342	2342	
M		1875	1876	
M-1		1878	1878	
N		1901	1902	
P		2567	2567	
Q		2572	2572	
	Defendant MCA's Exhibits			
DR		2399	2399	
DW		2402	2402	
EJ		327	328	
EL		2404	2404	
LC		1596	1596	

No.	Identified At Page No.	Offered At Page No.	Received At Page No.	Rejected
LW		703	706	
MP		2401	2401	
MQ		2401	2401	
MR		2402	2402	
MS		2404	2404	
MT		2403	2403	
MU		2403	2403	
MV		2403	2403	
MW		2404	2404	
MX		2411	2411	
MY		2411	2412	
MZ		2414	2415	
NA		2415	2415	
NB		2400	2400	
NC		2547	2548	
NC-1		2400	2401	
ND		2512	2512	
NE		2525	2525	
	Defendant Gregory's Exhibits			
A		1640	1641	
	Defendant Haetel's Exhibits			
A		2133	2134	
C		2124	2124	
D		2135	2136	